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Submitted
Jan. 24 1881

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 1034.

THE CITY OF CHICAGO, PLAINTIFF IN ERROR,

vs.

THOMAS TILLEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 18, 1880.

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SUPREME COURT OF THE UNITED STATES.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court rooms in the city of Chicago, in the district aforesaid, before the judges thereof, on Monday, the fifth day of April, in the year of our Lord one thousand eight hundred and eighty, and of our Independence the one hundred and fourth.

WILLIAM H. BRADLEY,
Clerk.

THOMAS TILLEY
v.
CITY OF CHICAGO. } Assumpsit.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the 22d day of August, A. D., 1878, came the said plaintiff, Thomas Tilley, by Messrs. Forrester, Beem, and M. W. Fuller, his attorneys, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in the district aforesaid, his bond for costs and præcipe for a writ of summons and declaration in said entitled cause, which said bond, præcipe, and declaration are respectively in the words and figures following, to wit:

Bond for costs.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, October term, A. D. 1878.

2 THOMAS TILLEY
v.
THE CITY OF CHICAGO. } In assumpsit.

We enter ourselves security for costs in this cause and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court, and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, we hereby agree and stipulate that execution may issue against us and our property for any costs taxed against us. Dated this twenty second day of August, A. D. 1878.

ROBERT F. FORRESTER.
WM. B. HOWARD.

(Endorsed.) Filed Aug. 22, A. D. 1878. Wm. H. Bradley, Clerk.

Præcipe.

Circuit court of the United States, Northern District of Illinois, October term, A. D. 1878.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

THOMAS TILLEY, PLAINTIFF,
vs.
THE CITY OF CHICAGO, DEFENDANT. } Assumpsit. Damages $150,000.0.

The clerk of said court will issue a summons in the above entitled

cause to said defendant in a plea of trespass on the case on prom-
3 ises, to the damage of said plaintiff in the sum of one hundred and fifty thousand dollars direct the same to the United States marshal for the northern district of Illinois to execute; and make it returnable to the October term of said court, A. D. 1878.

R. H. FORRESTER,
MARTIN BEEM, AND
MELVILLE W. FULLER,
Plaintiff's Attorneys.

To WM. H. BRADLEY, Esq., *Clerk.*

CHICAGO, *Aug.* 22, 1878.

(Endorsed:) Filed this 22d day of August, A. D. 1878. Wm. H. Bradley, clerk.

Declaration.

4 Circuit court of the United States for the seventh circuit and northern district of Illinois, of the October term, A. D. 1878, ss:

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Thomas Tilley, who is a citizen and resident of the State of Indiana, plaintiff in this suit, by R. H. Forrester, Martin Beem, and Melville W. Fuller, his attorneys, complains of the city of Chicago, which is an incorporated city of the State of Illinois, and situated within said district, defendant, in a plea of trespass on the case on promises, for that whereas heretofore, to wit, on the ninth day of August, in the year of our Lord one thousand eight hundred and seventy-five, at Chicago, to wit, at said district, the defendant being about to erect a new city hall and court-house in connection with the county of Cook, by its city council passed an ordinance that one architect should be appointed whose duty it should be to prepare the necessary plans and specifications for the erection of the city's portion of the new city hall and court-house upon block 39, in the original town of Chicago, commonly known as the Court-House Square, and when the plans and specifications for said buildings should have been prepared by him and agreed upon by the board of public works of said city, to take charge and superintend the construction of said building to its completion, under the direction and control of said board of public works, and to do and perform every other service or thing necessary to be done in and about the construction of and erection of the city's portion of said building to completion which should be required to be done and performed by him as such architect, by said board of public works, and that said architect should receive from said city of Chicago, as his full compensation for his entire services as such architect, the sum of thirty-seven thousand five hundred dollars ($37,500), said sum being 3 per cent. of the sum of one million two hundred
5 and fifty thousand dollars ($1,250,000), which should be the entire cost of the city's portion of said building, and such compensation should be in full for all services of such architect, and on other or further compensation whatever should be paid to him by said city; and thereupon, on the day aforesaid, at said district, said city council elected the plaintiff such architect; and the plaintiff further avers that on the day aforesaid, at said district, the plaintiff accepted said appointment of such architect upon the said terms and conditions set forth in said ordinance, and said board of public works afterwards reorganized, adopted,

and ratified such appointment upon said terms and conditions, by means whereof the defendant promised to pay to the plaintiff the said sum of thirty-seven thousand five hundred dollars; and the plaintiff further avers that afterwards, under the direction and control of said board of public works, he prepared the necessary plans and specifications for the erection of the city's portion of said new city hall and court-house, and superintended the excavations for the foundations of the same, and has performed and offered to perform all the said services required by said ordinance to be performed by him; and the plaintiff further avers that the defendant, by its mayor, who is the successor of said board of public works and clothed with its powers, after the plaintiff had performed said services and when he was ready and offered to continue to perform all the services required of him by said ordinance, without any cause whatever discharged him from his said employment of architect and

6 has ever since prevented him from further performing his duties as said architect in and about the erection of said city hall, nevertheless the defendant, though often thereto requested, has not yet paid the plaintiff the said sum of thirty-seven thousand five hundred dollars ($37,500) or any part thereof, but refuses so to do.

7 And whereas also the said defendant afterward, to wit, on the ninth day of August, in the year of our Lord one thousand eight hundred and seventy-five, to wit, at the district aforesaid, became and was indebted to the said plaintiff in a large sum of money, to wit, the sum of one hundred and ten thousand ($110,000) dollars of lawful money, for the work and labor, care and diligence, attention and attendance, of the said plaintiff, by the said plaintiff before that time done, performed, bestowed, and given, in and about the goods, chattels, wares, machinery, property, premises, possessions, and business of the said defendant, and for the said defendant, and at the special instance and request of said defendant, and also for divers materials and other necessary things by the said plaintiff before that time found, furnished, provided, used, and applied in and about that work and labor for the said defendant, at the like special instance and request of said defendant, and being so indebted to the said plaintiff, the said defendant, in consideration thereof, afterward, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay to said plaintiff said sum of money last mentioned when the said defendant should be thereunto afterward requested.

And whereas also afterward, to wit, on the same day and year and at the place aforesaid, in consideration that the said plaintiff had before that time done, performed, bestowed, and given other work and labor, care and diligence, attention and attendance of the said plaintiff in and about the goods, chattels, wares, machinery, property, premises, possessions, and business of the said defendant, at the request of said defendant, and had also, at the like special instance and request of said defendant, before that time found, furnished, provided, used, and applied divers other materials and necessary things in and about the said last-mentioned work and labor of the said plaintiff, the said defendant undertook and then and there faithfully promised the said plaintiff well and truly to pay to the said plaintiff so much money as the last aforesaid work and labor and materials of said plaintiff at the time aforesaid were reasonably worth, when said defendant should be thereunto afterward requested; and the said plaintiff aver that the same, at said time, were reasonably worth the further large sum of one hundred and ten thousand dollars, of like lawful money, at the time and place aforesaid,

whereof the said defendant afterward, to wit, at the time and place aforesaid, had notice.

And whereas also the said defendant afterward, to wit, on the same day and year and at the place aforesaid, became and was indebted to the said plaintiff in a large sum of money, to wit, the sum of one hundred and ten thousand dollars, of lawful money, for divers goods, wares, and merchandise, by the said plaintiff before that time sold and delivered to the said defendant, and at the special instance and request of the said defendant, and being so indebted to the said plaintiff the said defendant in consideration thereof, afterward, to wit, on the same day and year and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay to the said plaintiff the said sum of money last mentioned when the said defendant should be thereunto afterward requested.

And whereas also afterward, to wit, on the same day and year and at the place aforesaid, in consideration that the said plaintiff had before that time, at the like special instance and request of the said defendant, sold and delivered to the said defendant divers other goods, wares, and merchandise of the said plaintiff, the said defendant then and there undertook and faithfully promised the said plaintiff that the said defendant would well and truly pay to the said plaintiff so much money as the last aforesaid goods, wares, and merchandise, at the time of the sale and delivery thereof, were reasonably worth when the said defendant should be thereunto afterward requested; and the said plaintiff aver that the said goods, wares, and merchandise last mentioned, at the time of the sale and delivery thereof, were reasonably worth the further large sum of money, to wit, the sum of one hundred and ten thousand dollars, of like lawful money aforesaid, to wit, at the place aforesaid, whereof the said defendant afterward, on the same day and year and at the place aforesaid, had notice.

And whereas also the said defendant afterward, to wit, on the same day and year and at the place aforesaid, was indebted to the said plaintiff in the further large sum of money, to wit, the sum of one hundred and ten thousand dollars, of like lawful money as aforesaid, for money before that time lent and advanced by the said plaintiff to the defendant, and at the like request of the said defendant; and for other money by the said plaintiff before that time paid, laid out, and expended for the said defendant, and at the like request of the said defendant; and for other money by the said defendant before that time had and received to and for the use of the said plaintiff; and for other money before that time and then due and owing the said plaintiff for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from said defendant to said plaintiff; and being so indebted the said defedant, in consideration thereof, afterward, to wit, on the same day and year and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said several sums of money in this count mentioned when the said defendant should be thereunto afterward requested.

And whereas also the said defendant afterward, to wit, on the same day and year and at the place aforesaid, accounted with the said plaintiff of and concerning divers other sums of money, before that time due and owing from the said defendant to the said plaintiff, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said plaintiff in the further large sum of money, to wit, the sum of one hundred and ten thousand dollars of like lawful money as aforesaid;

and being so found in arrear and indebted to the said plaintiff, the said defendant in consideration thereof, afterward, to wit, on the same day and year and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last mentioned when the said defendant should be thereunto afterward requested.

Nevertheless, the said defendant (although often requested, etc.) has not yet paid the several said sums of money above mentioned, or any or either of them or any part thereof, to the said plaintiff, but to pay the same or any part thereof to the said plaintiff the said defendant ha' hitherto altogether refused, and still do refuse, to the damage of the said plaintiff of one hundred and fifty thousand dollars, and therefore the said plaintiff brings suit, etc.

R. H. FORRESTER,
MARTIN BEEM, AND
MELVILLE W. FULLER,
Plaintiff's Attorneys.

8 *Copy of instrument and account sued on.*

The City of Chicago to Thomas Tilley, Dr.

For services as architect in preparing plans for the new city hall	25,000 00
" services as architect in preparing a second set of plans with specifications and diagrams for the new city hall	42,500 00
" services as architect in superintending the building of the new city hall	42,500 00
	$110,000 00

The City of Chicago to Thomas Tilley, Dr.

To money lent and advanced	$110,000
To money paid, laid out, and expended	$110,000
To money had and received to and for the use of said plaintiff	$110,000
To goods, wares, and merchandise sold and delivered	$110,000
To labor and services	$110,000
To balance due on account stated	$110,000

(Endorsed:) Filed this 22 day of August, 1878. Wm. H. Bradley, clerk.

(Indorsed:) Circuit court of the United States, northern district of Illinois. Declaration.

9 And on the same day, to wit, the 22d day of August, A. D. 1878, a writ of summons issued out of said clerk's office in said entitled cause, which said writ, with the returns of the marshal endorsed thereon, is in the words and figures following, to wit:

Writ of summons.

Circuit court of the United States of America, northern district of Illinois, *ss.*:

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you to summon the City of Chicago, if found in your

district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of October next, to answer unto Thomas Tilley, of a plea of trespass on the case upon promises, to his damage, as he alleges, of one hundred and fifty thousand dollars, and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 22d day of August, in the year of our Lord one thousand eight hundred and twenty-eight, and of our Independence the 103d year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

10 I have served the within writ personally upon the within named City of Chicago, by delivering to James H. Gilbert, acting mayor for said city, a true copy thereof, this 24 day of August, A. D. 1878.

J. S. HILDRUP,
U. S. Marshal.
By D. D. SABIN,
Deputy.

(Endorsed:) Filed Aug. 26th, 1878. Wm. H. Bradley, clerk.

And afterwards, to wit, on the 9th day of October, A. D. 1878, said defendant The City of Chicago, by its attorney, filed in said clerk's office its plea in said entitled cause, which said plea is in the words and figures following, to wit:

Plea of city of Chicago.

Circuit court of the United States, northern district of Illinois, October term, 1878.

THOMAS TILLEY
v.
THE CITY OF CHICAGO. } Assumpsit.

And now comes the said defendant The City of Chicago by Richard S. Tuthill, its attorney, and defends the wrong and injury, when, &c., and says that it did not undertake or promise in manner and form as the plaintiff has above thereof complained against it, and of this defendant puts itself upon the country, &c.

RICHARD S. TUTHILL,
Defendant's Attorney.

11 (Endorsed:) Filed Oct. 9, 1878. Wm. H. Bradley, clerk.

And afterwards, to wit, on the 25th day of October, A. D. 1878, said plaintiff, by his attorneys, filed in said clerk's office his replication in said entitled cause, which said replication is in the words and figures following, to wit:

Replication.

Circuit court of the United States for the northern district of Illinois, of the October term, A. D. 1878, ss:

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

THOMAS TILLEY
v.
THE CITY OF CHICAGO. } Assumpsit.

And the plaintiff, as to the plea of the defendant above pleaded, and whereof it has put itself upon the country, does the like.

FORESTER AND BEEM, AND
MELVILLE W. FULLER,
Att'ys for Pl'ff.

(Endorsed:) Filed Oct. 25, '78. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the 14th day of January, A. D. 1880, in the December term, A. D. 1879, of said court, in the record of the
12 proceedings thereof, in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THOMAS TILLEY
v.
THE CITY OF CHICAGO. } Assumpsit.

Now come the parties, by their attorneys, and now come also the following jury, to wit, John Swansey, Colon Robinson, W. G. Morris, Edward H. Jack, C. A. Worden, C. W. Dey, William Halley, William Knapp, Warren Rogers, J. C. Persels, S. R. Morse, and Ira Crawford, in all twelve good and lawful jurors duly elected, tried, and sworn, and after hearing a part of the evidence, the hour for adjournment having arrived, the further trial of this cause is postponed until to-morrow morning.

Afterwards, to wit, on the 5th day of April, A. D. 1880, in the adjourned March term of said court, in the record of the proceedings thereof in said entitled cause before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THOMAS TILLEY
v.
THE CITY OF CHICAGO. } Assumpsit.

Now come the parties, by their attorneys, and now comes on to be heard the motion of the defendant heretofore entered herein for a new trial of this cause, and after hearing the arguments of counsel, the court overrules said motion and awards judgment. It is thereupon considered and adjudged by the court that the plaintiff do have and recover of the defendant the said sum of thirteen thousand dollars, his damages,
13 together with his costs and charges in this behalf expended, amounting to the sum of sixty-six dollars and one cent.

And on the same day, to wit, the 5th day of April, A. D. 1880, on the

trial of said cause the following exceptions were taken and allowed by the court, and made of record in the said entitled cause, to wit:

Bill of exceptions.

14 In the circuit court of the United States, northern district of Illinois.

UNITED STATES OF AMERICA,
Cook County, Illinois:

Bill of exceptions.

THOMAS TILLEY
vs.
THE CITY OF CHICAGO.

Be it remembered that on the trial of the above-entitled cause the plaintiff with other testimony offered in evidence the following proceedings of the city council of the city of Chicago, passed August 9th, 1875:

An ordinance repealing all ordinances, orders, and resolutions heretofore passed in relation to the erection of a city hall, and rescinding all former actions of the council either in the selection or election of an architect or architects or other thing done in the premises.

Be it ordained by the city council of the city of Chicago:

SECTION 1. That all ordinances and parts of ordinances, orders, and resolutions in any manner pertaining or relating to the erection and construction of the city portion of a new city hall and court-house on the public square commonly known as the Court-House Square, the same being block 39 original town of Chicago, or the preparations of
15 plans and specifications therefor, be and the same are hereby repealed.

SEC. 2. That all former actions of the city council of the city of Chicago selecting or electing any person or persons as an architect or architects to prepare the necessary plans and specifications for the erection and construction of the city's portion of said building, or to do any other thing or service whatever in or about the premises, be and the same are hereby repealed and rescinded.

SEC. 3. Nothing in this ordinance contained shall be so construed as to in any manner affect or in anywise rescind, impair, or annul any contract or agreement now subsisting between the city of Chicago and the county of Cook, either as to the place where said building is to be erected or other things pertaining to the erection and construction of said building jointly with said county of Cook.

SEC. 4. This ordinance shall take effect and be in force from and after its passage.

And immediately following the passage of this ordinance the council adopted the following order:

"Ordered, That one architect shall be appointed, whose duty it shall be to prepare the necessary plans and specifications for the erection of the city's portion of a new city hall and court house upon block 39 in the original town of Chicago, commonly known as Court-house Square,

and the general exterior design of the same to be of a uniform character and appearance, as shall be agreed upon by said architect and board of public works and said county commissioners, said architect when the plans and specifications for said building shall have been prepared by him and agreed upon by said board to take charge of and super-
16 intend the construction of said building to its completion, under the direction and control of said board of public works; and said architect shall also do and perform every other service or thing necessary to be done in and about the construction and erection of the city's portion of said building to completion which shall be required to be done performed by him as such architect by said board of public works, and said architect shall receive from the city of Chicago, as his full compensation for his entire services as such architect, the sum of $37,500.00; said sum being three per cent. of the sum of $1,250,000.00, which shall be the entire cost of the city's portion of said building, and such compensation shall be in full for all services of such architect, and no other or further compensation whatever shall be paid to him by said city.

That whenever said architect shall have been so appointed, and the plans and specifications agreed upon in manner aforesaid, said board of public works shall, without unnecessary delay, proceed to advertise, in the manner required by law, for *purposes* for excavating and putting in the foundation up to the established grade line for that portion of said building to be occupied by the city government, and situated west of the north and south central line of said block, and to let the contract or contracts therefor, and during the progress of said work the board is directed to advertise, in the manner required by law, for proposals for furnishing all the materials, and doing the remainder of the work necessary to be done, to complete the erection or construction of the city's portion of said building, and to let the contract or contracts there-
17 for, the contract or contracts for excavating and putting in said foundations for the city's portion of said building, as also the contract or contracts for furnishing the materials for and performing the remainder of the work necessary to be done to complete the city's portion of the said building, to be let in each instance whenever the board of county commissioners shall have let the contract or contracts for doing like work and furnishing the material for the construction of the county's portion of said building, so that the construction and erection of the city's portion of said building and the county's portion thereof shall be begun and progress to completion simultaneously, as nearly as may be.

And be it further provided, that the stone to be used in the construction of said building be hereafter determined by the city council.

And immediately following the passage of this order the council proceeded to the election of an architect to act under and in pursuance of this order, and the plaintiff, Thomas Tilley, was duly elected such architect.

The testimony further shows that, on the 24th day of August, the plaintiff was officially notified of his election as such architect, and that he, on the same day, accepted the employment, and offered to enter into a written contract and give bond for the performance of his duty, but such contract and bond were not deemed necessary by the city authorities, and they were dispensed with.

The plaintiff's proof tends to show that soon after the acceptance by him of his appointment by the city as its architect, he proceeded,
18 by direction of the board of public works, to prepare complete plans

for the city's portion of the proposed building; that he made plans for the several floors or stories of the building, consulted with the heads of the various departments of the city government as to the accommodations their departments would respectively need, and from the information thus obtained made interior plans or designs for the proposed building; that he also prepared designs and plans for the exterior of the building; that these plans or designs were exhibited to the members of the board of public works and to the city officers from time to time during the months of September, October, and part of November, 1875; that he also prepared plans and specifications for the excavation for the foundation, and that the board of public works advertised for bids for such excavations upon said specifications.

That the plaintiff superintended the same, and certified the work of the contractor to the board of public works, at their request, as architect. (This excavation was completed the first part of December, 1875.)

On the 13th of November, 1875, the plaintiff's plans were examined by the city officials, who seemed to like them very much; but Mr. Tilley explained to them that there was a difference between the city and county side, the county architect having gone on with his plans without consulting him, the plaintiff. November 15th the common council passed the following resolution:

"Resolved, That his honor the mayor, the board of public works, and the building committee of the city council invite the president of the county commissioners and the building committee of the county
19 board to meet and consult as to some feasible plan by which the difference arising between the city and county architects may be judiciously settled."

And pursuant to this resolution of the common council, a joint meeting of the mayor, the board of public works, the building committee of the common council, the president of the board of county commissioners, and the building committee of the county board was held to consult as to some feasible plan by which the difference between the city and county architects might be judiciously settled.

This joint meeting was held, and was not only attended by the city and county officials mentioned, but by the plaintiff, as architect of the city, and Mr. Egan, as architect of the county.

They had their respective plans there, and explained them to the officials in attendance. Mr. Tilley's plans were more ornate externally than those of Mr. Egan, and in that respect preferred by the city authorities.

The result of this meeting was a direction by the joint committee to the architects to proceed and prepare a joint compromise plan for the exterior of the building. The joint meeting adjourned till the 11th day of December following, for the purpose of giving the architects time to prepare their new plan or plans. The first joint meeting was held Nov. 30th, 1875, and upon its adjournment the plaintiff agreed with Mr. Egan to meet the latter at his, the plaintiff's, office the next day, and unite in the preparation of a joint plan.

The plaintiff's proof further tended to show that Mr. Egan did
20 not come on the next morning, and the plaintiff waited for him several days, when Mr. Egan sent word to the plaintiff that he, Egan, would not meet with him, but would get up a set of plans himself, and that plaintiff could do the same, and that thereupon, and after December 6th, the plaintiff went to work getting up a set of compromise plans upon the foundation plan of Egan, which were not completed when the meeting of Dec. 11, 1875, took place. On that day the joint meeting reassembled, and Mr. Egan presented sketches of a compromise

plan, more ornate externally than his first plan, but Mr. Tilley, the plaintiff, presented no plan, and explained to the meeting that he had not completed his sketches.

After examination and discussion the proof tends to show that Egan's compromise plan was adopted by the joint meeting subject to approval of common council & the county board, and the county board adopted the Egan plan soon afterwards. The report of the board of public works to the council on this joint meeting was transmitted Dec. 13th, 1875, and by the council referred to the committee on public buildings at the same date.

After this last joint meeting the proof tends to show that the plaintiff completed his compromise design, which after a time he submitted to the common council, and on the 27th day of December, 1875, sent a communication respecting the same to the common council.

The proof further tends to show that on the 13th day of January, 1876, at a special meeting of the council called for the purpose of considering all matters pertaining to the city hall and court house, the following proceedings were had:

"Report of the committee on public buildings on communication of Thomas Tilley laid over and published December 27th, 1875.

"Alderman Campbell moved that the report be referred to the board of public works, with instructions to adopt the plan referred to in Mr. Tilley's communication.

"The question then being, on motion of Ald. Campbell, to refer to the board of public works with instruction to adopt the Tilley compromise plan, it prevailed."

The following resolution was also adopted:

"Resolved, That the board of public works be, and they are hereby, directed to proceed at once to advertise for the construction of the foundation of the city's portion of the new court-house to grade, on the compromise plan submitted by Thomas Tilley, the city architect.

"And be it further

"Resolved, That the city clerk notify the county commissioners of the action of the city council and ask them to concur in the action of the city council in adopting the compromise plan as presented by Thomas Tilley, city architect, upon the Egan foundation."

The plaintiff's evidence tends to show that his compromise plans were submitted to the board of public works, who liked them better than the original ones, and after examining them all over, talking the matters over pro and con, told the plaintiff he might go ahead and prepare the foundation and sub-basement plans, but that before they proceeded any further than that they would notify the county architect to meet the plaintiff on the 18th of January and try to arrange the difference existing between the county architect's and plaintiff's plans as to the Washington and Randolph street fronts; as far as the La Salle street front was concerned, they said they were much pleased with, and it did not make any difference if there was a little difference between it and the Clark street front.

They notified the county architect to meet plaintiff on January 18th, and plaintiff went, but the county architect did not come.

The board then said to plaintiff it was no use to wait any longer, to go ahead and prepare his foundation and anything of that kind to grade line, get his interior arrangements done, and they would hold off on the Randolph and Washington street fronts until they heard more.

They told plaintiff to prepare the plan and specifications of the foundation and sub-basement to the grade line, and also to make his interna- arrangements for the various offices, and also to consult with the differl ent city authorities so as to make it satisfactory to all parties. Plaintiff did this, consulted with them from time to time and completed the internal arrangements, and submitted the plans and specifications for the sub-basement foundation in March, 1876; had to complete the internal arrangements before he could complete the foundations, everything of the kind, so as to know the bearings. The board of public works examined them all, and plaintiff explained them, and they said they were well satisfied. Plaintiff then wanted to know if the specifications were to be printed and the bidding for the foundations advertised. The board stated there was no money in the treasury at present to pay for the work, and they would hold on a spell, until the treasury was in a better shape, before they let the contract. Then plaintiff asked if he should go
23 on and complete the balance of the plans, and the board said he might do so, and he did all the drawings, tracings, & everything for the whole job.

The plaintiff's testimony further tends to show that afterwards he proceeded to complete his compromise plan, including floor plans for each story, specifications for foundation, sub-basement, and plans for exterior elevation, and in the early spring of 1876 his plans were in such a state of forwardness he could have proceeded with the construction of the building, and during that year fully completed entire plans for the building in accordance with the preliminary sketches submitted to the council prior to Jan. 13, 1876; that he was ready at all times to have proceeded with the construction of said building, but such construction was suspended; and that afterwards, in the fall of 1877, when there was money in the city treasury, and the city council determined to proceed with the construction of the building, he offered his services as architect and his services were refused, and he was prevented from officiating as such.

The proof further tends to show that the common council, in June, 1874, in the appropriation ordinance, made an appropriation for the year ending June 30th, 1875, of $661,000.00 for the construction of the city hall, and in June, 1875, made the same appropriation for the fiscal year ending June 30th, 1876, but in fact there was no money in the city treasury at that time, or any other time until September, 1877, to meet said appropriations, and with which to proceed with the work of constructing the city's portion of this building.

24 The plaintiff's proof further tends to show that he did not use any of the drawings of the first plan in the compilation of the second plan, and that there was a considerable difference between them, although they corresponded as to the internal arrangements except as modified by the change of the exterior.

The proof further tends to show that the internal arrangements of the two buildings were not intended to correspond; that the estimated cost of the building by plaintiff's on original plans was $1,250,000.00, and by his second set of plans was $1,500,000.00.

That in September, 1877, the city decided to get along without any other architect than the city building inspector, who was an architect, and as plaintiff was not allowed to superintend, he drew no working or detailed tracings or drawings, which are shown to belong to the superintendence.

That the plaintiff's original and compromise plans differed externally

from each other, and none of the drawings of the first set were used in the second.

On behalf of the plaintiff, evidence was adduced which tended to establish that by the custom and usage of architects in the city of Chicago, and the county of Cook, and throughout Illinois, that in the absence of a special contract, any architect employed to draw and who does draw plans for a building is entitled to superintend its erection, and also that by like usage and custom the uniform charge for full professional services as architect, including preliminary sketches, plans, specifications, working drawings, and superintendence, on public buildings, was five per cent. on the estimated cost; for preliminary sketches alone, one per cent.; for plans and specifications, two and one-half
25 to three per cent.; for plans without specifications, two per cent.; for detailed drawings and superintendence, one and one-half per cent. upon the estimated cost. That these two sets of plans (which were brought into court and exhibited) were worth two per cent. each on the estimated cost.

That the plaintiff had gone to an expense of from eight to ten thousand dollars, had worked upon the sketches, plans, &c., at least a year, and during the large part of that time had in his employ from eight to ten draughtsmen, and that plaintiff was an architect of more than fifteen years' standing.

And the defendant, to maintain *the* issue on the part, offered in evidence the following contract between the city of Chicago and the county of Cook:

Contract entered into as to joint occupancy of public square.

This agreement, made and entered into this 28th day of August, A. D. 1872, by and between the Board of County Commissioners of Cook County, representing said county, party of the first part, and the City of Chicago, party of the second part, witnesseth:

That whereas the said board of commissioners did heretofore, to wit, on the 5th day of August, A. D. 1872, adopt a preamble and resolutions as follows, to wit:

Whereas the county of Cook is the owner of block 39 in the original town of Chicago, commonly known as the court-house square, bounded by Randolph street on the north, by Clark street on the east, by Washington street on the south, and by La Salle street on the west, subject to certain rights of the city of Chicago in the west half of said
26 lot, and it is desired that all former arrangements between said city and said county in reference to the same shall be merged into a new agreement; and

Whereas the city of Chicago pro*fesses* to erect a city hall for the public offices of said city and the administration of its government at some central point in said city where the public may be accommodated; and

Whereas the board of commissioners of Cook County propose to erect on said block a court-house for the courts of Cook County and the public offices connected with the administration of the affairs of the county; and

Whereas it is for the convenience of the public and of all persons who desire to transact business with public officers that the courts and all offices connected with the administration of the affairs of the county of Cook and the city of Chicago should be located at some one convenient point and readily accessible to each other: Therefore,

Resolved, That an agreement be entered into by and on the part of the board of commissioners of Cook County, representing said county, of the one part, and the city of Chicago of the other part, whereby—

1. The said parties shall join in the erection of a public building in said block 39, for the use of the county and city governments, respectively, and the courts of record of said county.

2. The general exterior design of said building shall be of a uniform character and appearance, as may hereafter be agreed upon by the board of county commissioners and the common council of the city of Chicago.

3. That portion of the said building situate west of the north and south center line of said block shall be erected by the city of Chi-
27 cago at its own expense.

4. The city of Chicago shall occupy that portion of said block west of said center line for a city hall and offices incidental to the administration of the city government, and for no other purpose whatever, except as hereinafter provided.

5. Each of the parties hereto will heat, light, and otherwise maintain and furnish its own portion of said building.

6. The necessary expense of improving the grounds around said building and maintaining the same, shall be paid equally by the said city and county.

7. The said agreement shall contain a covenant on the part of the county that the said city of Chicago shall have control and occupancy of the said west half of said block for the said city hall and the public offices incidental to the government of said city, without hindrance, henceforth and forever. Provided, that whenever the city of Chicago shall cease to use the same for the purposes aforesaid, or shall rent the same or any portion thereof, for any other purposes than herein specified, then the said county shall have the right to resume the possession thereof, and in such case the said city shall forfeit all its rights therein, and this contract shall be null and void, but no forfeiture shall be incurred by the use of the same for supreme court purposes if the city should desire to sell the same.

8. The president of the board of Cook County commissioners, together with the building committee and the county clerk, attested by the seal of the county court of Cook County, shall be, and they are hereby, au-
thorized and empowered to execute such agreement for and in
28 behalf of the board of county commissioners of Cook County, and the same when executed by and on behalf of the city of Chicago by its proper officers, shall be binding on the parties, respectively, to the extent and for the purposes hereinbefore set forth.

And whereas heretofore, to wit, on the 5th day of August, A. D. 1872, the common council of the city of Chicago also adopted the said preamble and resolutions, modifying the same only to the extent that the agreement therein referred to should be executed on the part of the city of Chicago, by the mayor and comptroller and the city clerk, and attested under the corporation seal of said city:

Now, therefore, in consideration of the premises and the benefits that will result to the parties respectively, and the convenience the public will derive by reason of locating in one building the courts of record of Cook County, and all public offices connected with the administration of public affairs of the county of Cook and city of Chicago, it is hereby agreed as follows, to wit:

1. That the parties hereto will join in the erection of a public building on block 39 in the original town of Chicago, for the use of the county and city governments and the courts of record of said county.

2. The general exterior design of said building shall be of a uniform character and appearance, as may be hereafter agreed upon by the board of county commissioners and the common council of the city of Chicago.

3. That that portion of said building situate west of the north and south center line of said block shall be erected by the city of Chicago at its own expense.

29 4. That the city of Chicago shall occupy that portion of said lot west of said centre line for a city hall, and offices incidental to the administration of the city government, and for no other purpose whatsoever, except as hereinafter provided.

5. That each of the parties hereto will heat, light, and otherwise maintain and furnish its own portion of said building.

6. That the necessary expense of improving the grounds around said building and maintaining the same, shall be paid equally by said county and city.

And it is hereby covenanted and agreed by and on the part of the said party of the first part that the said city of Chicago shall have the control and occupancy of the said west half of said block for the said city hall and public city offices incidental to the government of said city without hindrance henceforth and forever; provided, that whenever the city of Chicago shall cease to use the same for the purposes aforesaid, or shall rent the same or any portion thereof for any other purposes than therein specified, then the said county shall have the right to resume possession thereof, and in such case the said city shall forfeit all its rights therein, and this contract shall be null and void, but no forfeiture shall be incurred by the use of the same for supreme court purposes, if the city should desire so to use the same.

In witness whereof the parties hereto have caused these presents to be executed for and on the part of the party of the first part by the president of the board of Cook County commissioners, the committee on public buildings of said board, and the county board, and at-

30 tested by the seal of the county court of Cook County, and for and on the part of the said party of the second part by the mayor and comptroller with the city clerk and attested by the corporation seal of the city of Chicago the day and year first above written.

[SEAL OF COUNTY COURT.]

JULIUS WHITE,
President Board of Cook County Commissioners.
S. ASHTON,
CHRISTIAN WAHL,
JOHN CRAWFORD,
J. H. PAHLMAN,
Committee on Public Buildings.

[SEAL OF CITY.]

G. W. WHEELER,
County Clerk, pro tem.
JOSEPH MEDILL,
Mayor of the City of Chicago.
A. H. BURLEY, *Comptroller.*
C. T. HOTCHKISS, *City Clerk.*

Also, evidence which tend to show that the board of public works was composed of Redmond Prindiville, J. K. Thompson, and Louis Wahl, who were in office during the time in controversy, and down to the 18th of September, 1876, when the board was abolished.

Also, evidence which tended to show that James Egan was appointed

county architect prior to the appointment of Mr. Tilley as city architect, and that his plan for the exterior design of the court-house and city hall had been submitted to and approved by the county board about the first of September, 1875. That the plaintiff called upon the
31 county architect five or six times between the first of September and the first of November, 1875, looked over the work of Mr. Egan as it was progressing, saw the interior designs of the building, but made no suggestions in regard thereto. That the county let its contracts for the foundation work about the first week in October, 1875.

Also, evidence tending to show that after the adoption by the county of the Egan plans, that the members of the board of public works visited Mr. Egan' office and examined his plans and expressed their satisfaction with the way matters were proceeding.

Also, evidence tending to show the following correspondence between the two architects:

J. J. EGAN, Esq.:

DEAR SIR: I beg to inform you that I have now perfected my drawings according to the plan adopted by the city, so far as the city portions is concerned, and should be glad to have you inspect the same and receive suggestions, as may be required to preserve a harmonious relation between the county and city.

Yours,

THOMAS TILLEY.

CHICAGO, *Nov.* 11, 1875.

Mr. Egan, in reply to this letter, wrote the following answer:

THOMAS TILLEY, Esq.:

DEAR SIR: In reply to yours received of the 11th inst., I beg leave to inform you of the fact that the plans of the county portion of
32 the new court-house have already been adopted and approved, and I must also remind you of the fact which you have long been acquainted with, namely, that the contracts for the foundation of the county portion have been entered into, and that the work is now in progress. Any alteration or change in the superstructure other than those which we have already discussed, and which, at your suggestion, I have adopted to some extent, would involve the county in endless litigation or subject it to the control of the contractor with respect to extra charges, a matter which I am strictly bound under my contract as architect to guard against.

I cannot refrain from the expression of my regret at the extraordinary mode of your procedure, to say nothing of the want of courtesy to myself. You had repeated opportunities of informing me during our many consultations that you intended to perfect a new plan. You are well aware of the acceptance of the plan by the county, and after the letting of the contract you visited my office, asked for and received from my hands copies of the several drawings, the perfecting of which you had observed upon my invitation from time to time, and you now for the first time inform me that you have perfected a new design, which common sense and good judgment as an architect would convince you would be impossible for me to adopt without the most ruinous financial consequences for the county.

Under these circumstances, I cannot, without the instructions of the county board, enter into the consideration of a new plan.

Respectfully,

J. J. EGAN.

33 Also the following communication from the board of public works to the joint committee of the council and board of county commissioners:

To his honor the mayor, the president of the board of county commissioners, the committee on public service and public buildings of the board of county commissioners of Cook County, and the committee on public buildings of the city council of the city of Chicago:

GENTLEMEN: In compliance with a resolution passed by your honorable bodies, at a meeting held in this office on the 24th instant, the board of public works would respectfully report that, after having several conferences with the architects appointed by the city and county and having examined as fully as possible in the limited time allotted to us, the plans submitted by them, we are forced to the following conclusions: While we regard the Tilley plans as beautiful in design and suited in many respects to the wants of the city, they cannot, in our opinion, be carried to completion so as to give the county such rooms as are required for the various courts, the county clerk's, the recorder's, the collector's, and other large offices, shown in the design of the county part of the building. Neither do we think a building so ornate can be built for anything like the amount to *include* the county and city authorities have limited its cost.

34 On the other hand, we see no difficulty in getting all the room required by the city without seriously interfering with the outline of the building adopted by the county. Owing to the broken outline of the Tilley plans, they must necessarily cover a greater area of ground in order to get the rooms required by the city and county, thus reducing the space between the buildings to such an extent as to interfere seriously with the light in many of the offices.

We are of the opinion that a beautiful building may be obtained without seriously interfering with the outline of the county plans, and it is absolutely certain that a change to any great extent in those outlines will necessitate an entire change of the interior arrangements of the county's half of the building.

Under all the circumstances we would respectfully recommend to your honorable bodies that the architects be directed to prepare jointly an alteration treated architecturally differently from those heretofore submitted, in order to harmonize the existing difficulties.

R. PRINDIVILLE.
J. K. THOMPSON.
LOUIS WAHL.

Also the following communication from Mr. Tilley, the plaintiff, to the board of public works of the city of Chicago, dated December 4th, 1875.

ROOM 63, 4, & 5, COLEBUER BUILDING,
126 WASHINGTON STREET,
Chicago, Dec'r 4th, 1875.

To the board of public works of the city of Chicago:

GENTLEMEN:

35 I deem it my duty to report the conclusion to which I have arrived in regard to the plans for the court-house in order that my position may not be misunderstood.

I desire to recognize the authority of your board in the premises, as appears by the record of proceedings, and to harmonize matters so that the right of the city and its authority shall be preserved.

On the 5th day of August, 1873, the council passed an order authorizing the mayor and comptroller to execute an agreement on the part of the city with the county, the basis of which is, among other things, that the general exterior design of said building shall be of a uniform character and appearance, as may be hereafter agreed upon by the board of county commissioners and the common council of the city of Chicago.

The agreement was prepared and executed in due form, containing the above provision. On the 10th of October, 1873, a resolution was adopted by the council as follows:

"Resolved, That the plan known as Eureka, or number five in the collection submitted for court-house and city hall, be, and is hereby, selected and adopted as the plan after which to build such court-house and city hall, the board of commissioners of Cook County concurring, subject to such changes and modifications as may be hereafter determined upon by the common council of the city of Chicago and the county board, provided the estimate of the architect who has presented such plan as to the cost of construction of the building shall be verified."

36 This resolution of the council was concurred in by the county board.

After this the question of the selection of architects was discussed in the council and the county board, and some proceedings were had.

On the 9th of August, 1875, an ordinance was passed by the council which contained the following:

"SEC. 1. That all ordinances and parts of ordinances, orders, and resolutions in any manner pertaining or relating to the erection and construction of the city's portion of a new city hall and court-house on the public square known as the Court-House Square, the same being block 39, original town of Chicago, or the preparation of plans and specifications therefor be, and the same are hereby, repealed."

The adoption of the ordinance was not concurred in nor any action taken on it by the county board.

But so far as the record shows up to that time, the county board took no steps which would result in a concurrent action with the council changing the prior concurrent action adopting the plan above named.

It is app'ent, however, that the council did not intend any change in the original contract between the city and county board, for in the same ordinance the following was adopted:

SEC. 3. "Nothing in the ordinance contained shall be so constructed at to in any manner affect or in any wise rescind, impair, or annul any contract or other agreement now subsisting between the city of Chicago and the county of Cook, either as to the place where said building

37 is to be erected or other thing pertaining to the erection and construction of said building jointly with said county of Cook."

Now, when the above contract was executed and the parties thereto united upon a general plan, that plan became a part of the contract and was not subject to a change, except by concurrent action and the above saving clause, so far as that general plan forms a part of the contract, saves it.

Nor is this view of it inconsistent with subsequent proceedings of the council, for it will be remembered that there is a reservation of the council in adopting Eureka, as follows: "Subject to such changes and modifications as may hereafter be determined upon by the common council of the city of Chicago and the county board."

A question was raised as to the power of the council to make public improvements, and an opinion was given by the law department that the charter gave authority to the board of public works, and no action of the council was had thereto, and the repealing ordinance was adopted saving the contract and the adoption of the plan and all that implied.

A further ordinance was adopted, not at all inconsistent with the contract and the above repealing ordinance, which is as follows:

"AUG. 9TH, 1875.

"Ordered that one architect shall be appointed, whose duty it shall be to prepare the necessary plans and specifications for the erection of the city's portion of a new city hall and court house upon block 39 in the original town of Chicago, commonly known as the court-house square, and the general exterior design of the same to be of a uniform character and appearance as shall be agreed upon by said architect and
38 board of public works and said county commissioners."

This recognized the contract, for it speaks of the city's portion, which had been determined by that contract. It also provides for a uniform design externally.

I was appointed architect under this ordinance. For the purpose of preparing plans, I had recourse, first, to the contract, which required uniformity and which was a concurrent action; second, to the adoption of a plan by both boards, in which the idea of uniformity was not lost sight of. It was my duty, as I understood it, to follow such general plan as had met the joint approval of both boards and which had never been changed by their joint action.

Now, I was appointed on the 9th of August, 1875. On the 11th of August, 1875, the county, just two days after, adopted independent plans for its portion and took steps to complete the same without any consultation with me or the board of public works.

These plans were adopted absolutely and without reference to the interest of the city or the idea of general uniformity, so far as the city was concerned, and the architect of the county proceeded and contracts were actually let before any joint conclusion was arrived at.

Inasmuch as the contract originally provided for a uniform design and the joint resolution adopting a plan, provided for joint action in case any change was necessary or desirable—no such joint action having been had—and inasmuch as the ordinance under which I was appointed requires uniformity of exterior design, as shall be determined by the proper authorities of the city and county, I utterly fail to see how the county can proceed with the erection of its portion of the building without the concurrence of the proper authorities of the city as
39 to the exterior design, and every day the county proceeds with the execution of its own plan and renders more difficult the question of concurrent action.

I am ready, together with your board of public works, to proceed in the labor of agreeing upon a uniform plan, but until such a plan is agreed upon I cannot see how the county can proceed in view of the existing contract.

I understand Mr. Egan is in favor of a uniform plan, but that he is so tied up by a positive plan adopted by the county without consultation with the city authorities, and by contracts already let and now being executed, so that the only uniform plan he can agree upon is his uniform plan.

My consultation with Mr. Egan led me to the same conclusion, for if

I understood him correctly he says he cannot change his plan without authority from county board.

I desire, therefore, that the proper authority of the city shall determine my duty in the premises, that I may be advised how to proceed.

My position, as defined in this letter, is sustained by my legal advisers as being thoroughly in accordance with the actions taken by both boards and warranted in its conclusions.

Yours, very truly,

THOMAS TILLEY,
Architect for the City.

Also a communication enclosing the foregoing to the city council.

ROOMS 63, '4 & '5 COLEHEUR B'D'G,
126 WASHINGTON STREET,
40 *Chicago, Dec. 6th*, 1875.

To the Hon. common council of the city of Chicago:

GENTLEMEN: I present herewith and as part hereof, a communication sent by me to the board of public works.

It is proper that the situation should be brought to the knowledge of the proper city authority, so that intelligent action may be had in the premises, if necessary.

Having been appointed by your honorable body and having prepared plans pursuant to the spirit of the contract between the city and the county, and the proceedings of the council, I desire to be advised whether the proper*ty* authority of the city deems it advisable to give me any instructions different from the conclusions at which I arrived, as set forth in the enclosed copy of a communication to the board of public works.

I have up to the present incurred considerable expense in perfecting my plans according to the record shown herewith, and feel unwilling to incur further expenditure, unless so directed.

THOMAS TILLEY,
Architect for the City.

Which communication was referred by the council Dec. 6th, 1875, to the committee on public buildings.

The defendant further introduced a communication from the board of public works to the city council.

41 OFFICES OF THE BOARD OF PUBLIC WORKS, CITY HALL,
Chicago, December 13th, 1875.

To the mayor and aldermen of the city of Chicago in city council assembled:

GENTLEMEN: In accordance with a resolution adopted by your honorable body, on November 15th, several meetings have been held with a view to securing harmony on the part of the city and county architects in the preparation of a plan for the new city hall and court-house.

These meetings were attended, on behalf of the county, by the president of the board of county commissioners and the committees on public buildings and public service of that board; and on behalf of the city, by his honor the mayor, the committee on public buildings of your honorable body, and the board of public works.

After finding it impossible to harmonize the plans prepared by the city and county architects, a resolution was adopted directing these gentlemen to prepare a plan jointly with a new elevation, but adhering as much as possible to the plan of the foundation, which was in course of construction for the county's portion of the building.

The architects agreed to comply with this resolution, but Mr. Tilley, the city's architect subsequently refused to carry out this agreement, and has not co operated in the preparation of a new plan. Mr. Egan, architect of the county, has prepared a new plan much more beautiful in design than the one originally presented by him, and it has been approved by the joint meeting, subject to the approval of your hon-
42 orable body and the board of county commissioners, as the changes made would increase the cost of the building from about $2,500,000 to about $3,300,000.

A letter from Mr. Tilley and an opinion of the law department in relation thereto are herewith enclosed.

Very respectfully,

R. PRINDIVILLE,
J. K. THOMPSON,
LEWIS WAHL,
Board of Public Works.

Also evidence tending to show that Mr. Egan did not meet with the plaintiff at the time agreed upon at the joint meeting, for the reason that next morning after said joint meeting there appeared in the Times newspaper, published in the city of Chicago, what purported to be an interview with Mr. Tilley, in which he stated, among other things, that he did not propose to meet with Mr. Egan and prepare a joint plan with him; that on seeing this Mr. Egan dispatched a note to Mr. Tilley, asking him if the statements in the interview were true. Mr. Tilley's reply was that they were partly true and partly not, and that he was about to address a communication to the city council, and that in consequence of that reply Mr. Egan did not go to Mr. Tilley's office.

Evidence on cross examination was brought out, tending to show that January 18th, after the county architect failed to meet the plaintiff and the board of public works January 18th, 1876, the president
43 of the board declared that as plans had been adopted by the county board and the common council the only thing to do was to prepare specifications for the foundations of the city building, and plaintiff was accordingly ordered to prepare them at once; that the board of public works declared that when the specifications were completed the board would advertise for bids for the putting in of the foundations, and pending their construction the city officials trusted something would turn up to bring about a harmony of the two plans, and, if not, resort would be had to the courts, as the city officials said they would not go back on their former action nor tolerate the erection of two separate buildings on the court-house square.

Also, evidence tending to show that the board of public works did not do anything whatever in regard to the compromise plan of Mr. Tilley, and did nothing afterwards recognizing Mr. Tilley as the city architect.

Also, evidence tending to show that the county board, in adopting the compromise plan of Egan, increased the expenditure of its building very largely.

Also, evidence tending to show that in September, 1877, the city au-

thorities purchased the compromise plans from Mr. Egan, and that the city's portion of the building is being erected on that plan.

Also, evidence tending to show that the next week after the meeting of December 11th, 1875, the county board adopted the Egan compromise plan, and proceeded to build their part of the court-house upon that plan.

Also, evidence tending to show that neither of the plans prepared by the plaintiff harmonizes in its exterior design with the county plan

44 It was agreed that the city of Chicago become incorporated May 3d, 1875, under the act of the general assembly of Illinois, entitled "An act to provide for the incorporation of cities and villages," approved Apr. 10th, 1872.

The court then charged the jury as follows:

GENTLEMEN OF THE JURY: This is an action to recover for services claimed to have been rendered by the complainant to the defendant city, as architect of the new city hall.

It is admitted that in August, 1872, the city authorities and the board of county commissioners of Cook County entered into a contract for the construction of a building to be used for county and city purposes, in block 39, in the old town of Chicago, by which the county was to construct its court-house in the east half, and the city to construct its city hall on the west half of said block.

This contract contained the following provisions: "The exterior design of said building shall be of a uniform character and appearance, as may be hereafter agreed upon by the board of county commissioners and the common council of the city of Chicago."

In the latter part of the summer of 1875 action was taken by the board of county commissioners, looking to the speedy commencement of the construction of the court house by the county. On the 9th of August, 1875, the common council of the city of Chicago adopted the following ordinance. (The judge here read the proceedings of the council of August 9th, 1875, as given heretofore.)

It will be seen that while this ordinance repeals all action

45 which had been previously taken on the part of the city council in regard to the adoption of plans and appointment of architects for the proposed new city hall, at the same time it expressly reserved the agreement existing between the city and county authorities in regard to the proposed building. At the same meeting, and as the next business transacted after the passage of the ordinance just read, the council adopted the following order:

(Here was read the order of August 9, 1875, providing for an architect.)

And immediately following the passage of this order the council proceeded to the election of architect to act under and in pursuance of this order, and the plaintiff, Thomas Tilley, was duly elected such architect; and the testimony of the plaintiff, which is not disputed in this regard, shows that on the 24th of August the plaintiff was officially notified of his election as such architect, and that he on the same day accepted the employment or appointment, and offered to enter into a written contract and give bonds for the performance of his duties; but such contract and bond was not deemed necessary by the city authorities, and they were dispensed with.

The plaintiff claims that by the passage of this order, his election under it and his acceptance of the employment thereunder constituted a contract between himself and the city, and that the services to recover for which this suit is brought were rendered under and in pursuance of such contract, and the contest in this case is as to what service the

plaintiff rendered under this contract, and what compensation he is entitled to receive for such services, it being admitted that he has
46 been paid nothing for whatever services he has rendered.

I concur with the counsel upon the general proposition that whatever expressed contract was made between the plaintiff and the city must be found in this order; that is to say, there is no other legislation or action of the common council which, taken by itself, makes a contract between the plaintiff and the city. The order sets out with providing that one architect shall be appointed, whose duty it shall be to prepare the necessary plans and specifications for the erection of the city's portion of the new city hall and court-house, and the plaintiff was elected such architect. No other action of the common council or city authorities appears in the proof defining the duties of the plaintiff under this appointment.

This order explicitly provides that in preparing the plans and specifications of the city's portion of this building the "general exterior design of the same shall be of a uniform character as shall be agreed upon by the said architects and the board of public works and the county commissioners." It provides that when the plans and specifications have been prepared by the architect "and agreed upon by said board," the architect "shall take charge of and superintend the construction of said building to its completion," under the direction of the board of public works, for all of which services plaintiff was to receive as compensation the sum of $37,500.00, being three per cent. of the sum of $1,500,000.00, the estimated cost of the city's portion of the building.

There is no provision in the contract, or in any of the subsequent dealings or relations between the parties, that shows how this
47 sum was to be paid; but I think the fair presumption is, inasmuch as it was expected that the completion of this work would extend through a long term of years perhaps, that the plaintiff was not to wait until the entire completion of the works before he received some compensation, and that he was to be paid from time to time upon some basis to be established, so that when the work was done he sh'uld not have received more than the aggregate amount of his compensation. The order further provides that whenever the plans and specifications shall be agreed upon in manner aforesaid, that is, between the architect, board of public works, and county commissioners, the board of public works shall proceed with the construction of the city's portion of said buildings; that is to say, the general idea which seemed to be incorporated in this order, as passed by the common council, was that the city was to proceed with the construction of its building at the same time and simultaneously with the construction of the county's building, so that the two buildings should go up together; and not only that they should be uniform in appearance, but be carried up as it were simultaneously, one half by the city and the other by the county.

It is clear that the first step to be taken by the architect and board of public works under this action of the council was to agree with the county commissioners upon a uniform design or plan for the exterior of the entire building, considered as a whole in exterior appearance, which the city and county had agreed to erect on this block.

It was to be treated and considered architecturally as one building, covering the entire block, or perhaps as two buildings externally
48 alike—one occupying the east and the other the west half of the work. The idea of oneness or uniformity of external appearance had been provided for in the contract between the city and county, and

had been carefully preserved in the ordinances or other action of the council which I have read.

Considerable has been said upon the argument to the court in your hearing, as to what were the special powers of the board of public works, under the charter of the city, adopted in May, 1875, as to whether the new general charter did or did not continue this board in existence, with all the powers which they were clothed under the old city charter; but for the purpose of this case I do not think this question of any special importance, it being conceded that the board remained in existence as a matter of fact and continued to substantially exercise the functions with which it was invested under the old charter, until September, 1876, and during the most of the time the events were occurring which have been narrated on this trial; and it also appearing that whatever duties devolved upon the board of public works, under the ordinance in this case, were specifically assigned to them; and so, whether they were a separate corporation or a member of the city government, clothed with certain independent powers, or whether they were a mere committee of reputable gentlemen, to whom the council from time to time delegated certain powers and imposed upon them certain duties, is immaterial; it makes no difference for the purposes of this case whether they derived or held these powers from the original charter
49 or whether they received them by express delegation; because whatever action they did take in reference to the subject-matter of this suit, was taken under the order which *which* I have read and the subsequent action of the council.

The plaintiff's proof tends to show that soon after the acceptance of employment by him as architect, under the order of Aug. 9th, he proceeded to prepare plans for the city's portion of the city hall.

That he made plans for the several floors or stories of the buildings, consulted with the heads of the various departments of the city government as to the accommodations their departments would respectively need, and from the information thus obtained, made interior plans for the proposed building, and that he also prepared designs and plans for the exterior of the building; that these plans or designs were exhibited to the members of the board of public works and to the city officers, from time to time, during the months of September, October, and a part of November.

That the board of public works proceeded to advertize for bids for excavating the foundations, and that the plaintiff prepared the plans and specifications for such excavation, and also prepared plans and specifications for the foundations and sub-basement of the proposed building.

In the fore part of November it was ascertained that the plans prepared by plaintiff did not harmonize with the plans which had been prepared by Mr. Egan, the architect of the county buildings, and
50 pursuant to a resolution of the common council, passed November 15th, a joint meeting of the mayor, the board of public works, the building committee of the common council, the president of the board of county commissioners, and the building committee of the county board, was held to consult as to some feasible plan by which the difference arising between the city and county architects might be satisfactorily settled. This joint meeting was held, and was attended not only by the city and county officials mentioned, but also by the plaintiff, as architect of the city, and Mr. Egan, as architect for the county. They laid their respective plans there and explained them to the officials in attendance. The result of this meeting, or perhaps of two meetings, for

consultation and examination of plans, was a direction by the joint meeting to the architects to proceed and prepare a joint compromise plan for the exterior of the building. The evidence in regard to this joint meeting tends to show that it was understood by the city and county officials that the two architects were to co-operate with each other and present a compromise plan, as the result of their joint efforts to secure harmonious action. I say, tends to show; because whether it does show that, is for you to pass upon. The joint meeting adjourned for a future day, for the purpose of giving the architects time to prepare their new plan or plans. On the day to which the adjournment was had, the joint meeting reassembled, and Mr. Egan presented sketches of a compromise plan, embodying, substantially, the features upon which the building is now being constructed, but Mr. Tilley, the plaintiff,
51 presented no plan, and did not concur in or endorse Egan's plan.

After an examination and discussion of Egan's compromise plan, the proof tends to show that it was adopted by the joint meeting, and the county authorities proceeded to act upon that plan as the one which had been agreed upon and settled by the city and county authorities. After the last joint meeting, the proof tends to show that the plaintiff proceeded to prepare "compromise plans" which, after a time, he exhibited in the ante room of the council chamber, and perhaps the proof shows, or tends to show, that he exhibited them also to members of the board of public works at the office of the board.

On the 13th of January, at a special meeting of the council called for the purpose of considering matters pertaining to the city hall and court-house, a resolution was passed by the council which, in effect, directed the board of public works to adopt the plaintiff's compromise plans, and the following resolutions were adopted as part of the proceedings of this meeting (here the judge read the resolutions adopted by the council at the special meeting held Jan'y 13th, 1876.)

The plaintiff's testimony tends to show that after this meeting of the common council he proceeded to complete his compromise plan, including floor plans for each story, specifications for foundations, and sub-basements, and plans for exterior elevation, so that in the early spring of 1876 his plans were in such a state for forwardness, that he could have proceeded with the construction of the building, and
52 had the tracings and working drawings ready as soon as needed for the progress of the work; that he was ready at all times to have proceeded with the construction of said building, but that he was not allowed to do so; that in the fall of 1876 and spring of 1877, when the city council determined to proceed with the construction of the building, he offered his services as architect, and his services were refused; that is to say, he offered to proceed and perform his part of the contract by supervising the construction of the building when the city was ready to proceed with its construction.

Upon this testimony the plaintiff claims to recover on one of the two propositions:

First. Either for the agreed compensation stipulated in the order of Aug. 9, $37,500, on the ground that he had accepted the employment and entered upon its performance, and was prevented from completing the contract by the action of the officers of defendant, without any fault on his part; or

Second. For the fair value of the work done by him in the course of his employment in the preparation of the two plans mentioned in the proof, at the usual scale of prices charged by architects in this city for similar services at that time.

In answer to these claims the defendant contends—

First. That the work done by the plaintiff in preparing these two sets of drawings was not called for or required by the board of public works, under whose direction the plaintiff was to act in the preparation of plans under the order of his appointment; that the plans prepared by
53 plaintiff were never adopted by the city and county authorities, pursuant to the contract of August, 1872, requiring that the whole building should be of uniform design and appearance, and that the plans prepared by plaintiff were valueless to defendant and have never been in fact adopted or used by defendant; and that—

Second. That plaintiff, on being instructed to prepare compromise plans in connection with the county architect, refused to do so, and has thereby broken his contract and forfeited all claim to any compensation under it.

The proof shows without dispute that while the common council in June, 1874, made a nominal appropriation of about $600,000 to erect the city hall, yet there was, in fact, no money in the city treasury at that time, nor at any other time, until some time in September, 1877, with which to proceed with the work of constructing the city portion of this building. But the county had resolved to proceed with its building, and the design for the exterior of the whole was to be uniform.

It was the duty of the city and county authorities to agree upon this uniform plan, and non-professional persons, like the members of the common council and board of public works, would require the aid of an architect in settling on the design to be adopted.

It was therefore proper that the city should appoint an architect, and charge him, in connection with the board of public works, with the duty of agreeing upon a uniform design for this proposed building. Good faith to the county required that this should be done so as to not delay the work of the county, even if the city was not ready to proceed.

54 It therefore became the duty of the plaintiff, under his appointment, to ascertain, first, the accommodations which should be provided in the city's half of the proposed building for the different departments of the city government.

This did not require the preparation of full drawings or plans involving all the materials to be used, or details of construction; a mere design or sketch, allotting the space, and showing how the proposed plans could be utilized to the best advantage, was all that was needed for this purpose. So much for the interior work.

As to the exterior, inasmuch as the contracts between the county and city required that the county and city portions should be of uniform design, one would suppose that the first step would be for the architects of the two portions to meet and try and agree upon a uniform plan to present to their respective clients, or if this was not done that each architect should proceed to sketch one or more designs to be discussed and compared by the county and city authorities for the purpose of agreeing finally.

I do not conceive from anything in the order defining his duties the plaintiff was required or authorized to do more than suggest plans either to the city authorities or to the architect of the county, so as to bring the contracting parties to an agreement.

When the exterior plans were agreed upon, the outer lines of the foundations defined as they must be by the exterior designs and plans, then the interior of each half of the building belonged exclusively to its own architect. The first step was to arrive at an agreement as to

the uniform exterior, which the testimony on the part of the defendant, if not that of the plaintiff, also, tends to show the plaintiff never did; that is, he went to work to get up plans of his own, obtaining certain data from Egan's plans, between the time of his appointment, in August, and the time of the meeting, in November.

The plaintiff's own testimony seems to show, although of that you are the judges, and not the court, that the plaintiff at once after his appointment proceeded to prepare elaborate plans for the elevation and exterior without consulting either the board of public works or the county architect; and when those plans were nearly if not quite completed, and, as the plaintiff says, after he had spent a great deal of time and money on them, it was found there were wide differences between the plaintiff and the county architect, and the joint meeting was called to try and harmonize the plans of these two architects.

I do not intend to be understood as saying that all the plaintiff had done on these first set of plans was unauthorized, because to a certain extent the interior plans had to be designed or suggested, and the work in that direction was probably to some extent if not wholly available in the second set of plans. These are mere suggestions intended only to direct your attention to this point. The plaintiff admits that he did not present a compromise plan to the adjourned joint meeting.

The defendant insists that this was because the plaintiff was determined not to agree with any plans Egan might propose, and in this connection defendant has offered in evidence the plaintiff's
56 communication to the common council of December 4th and 5th.

From the correspondence between plaintiff and Egan as shown in the letter read and the newspaper interviews, from all which defendant insists that it appears that plaintiff did not intend to co-operate, and in fact refused to co-operate with Egan in the preparation of compromise plans, the weight of this testimony, and whether it proves what is insisted by defendant, or what it proves, is for you to consider.

But the plaintiff contends that the common council, at the meeting of January 13th, adopted his compromise plan, and having adopted is bound to pay for them, whether they have agreed with the county authorities in regard to their ultimate adoption by the two parties or not. It is true these last plans of plaintiff were by the resolution of the council at that meeting referred to the board of public works with directions to adopt them, and the board of public works was undoubtedly at that time only empowered to act as it should be directed by the council. It had no independent discretion of its own, but when the entire proceedings of that meeting are read and taken together, I think, and so instruct you, they only amounted to an approval of the plaintiff's compromise plan by the city council and a recommendation of them to the county commissioners, because the last resolution is, "Resolved, that the city clerk notify the county commissioners of the action of the city council, and asks them to concur in the action of the said council in adopting the compromise plans as presented by Thomas Tilley, architect." Here
57 is a clear and manifest reservation of the idea that the city had at that meeting, or any previous time, concluded to proceed and adopt Tilley's compromise plan without reference to what plan might be adopted by the county. On the contrary, it is expressly conceded that the co-operation of the county in the adoption of Tilley's compromise plan is solicited, and this action of the common council, when all taken together, must amount to only this: that the common council had expressed its satisfaction with the Tilley compromise plan, and requested that the

county commissioners examine them, and, if possible, also express their satisfaction.

I do not find, therefore, in this act of the common council of January 13th anything which authorizes or directs the plaintiff to consider his plan as definitely adopted by the city.

The council evidently intended to stand by the contract of August, 1872, in "regard to uniform exterior." Therefore the plaintiff was not authorized by this action to proceed to perfect and elaborate this plan as if it were decided that the building was to be erected in the manner then suggested, but the plaintiff was, I think, still bound to wait for definite action by the city and county authorities before he proceeded to spend more time and money upon the elaboration of what is called his compromise plan. So that whatever the plaintiff did towards elaborating or completing his compromise plan further than to show its general design, I think, and so charge you, was unauthorized.

58 There is evidence in the case tending to show that the Egan compromise plans to some extent adopted suggestions from the city officials and Mr. Tilley as to the exterior design.

The city authorities wished a more ornate design for the exterior than that first proposed by Egan, and this modification made, and perhaps it is not going too far for me to say, was probably suggested by the plaintiff, although it is for you to pass upon this as a question of fact. The plaintiff had prepared exterior designs, which it is conceded were more ornate, or thought to be, than those of Egan, at the joint meeting, and there was a discussion of the merits of these designs, and the city officials came to the conclusion that they could be harmonized and a more ornate design could be obtained by a sort of compromise between the two, and it was with reference to obtaining that, that the adjournment was had, and the architects were directed to get up a new or compromise plan.

It must be admitted, I think, that the plaintiff rendered service, which at least must be considered to have required and involved his professional skill during the time the plans were under discussion. Still, as I have already said, he was not authorized to proceed independently, without consulting anybody, to get up elaborate plans in the first instance; yet, when he was called to produce a plan for the joint meeting, whatever the plans were worth as studies, he was fairly entitled to compensation, for it was in the line, in other words, of his employment and duty.

59 The plaintiff had made designs for elevations, and it is presumable the ideas of the city officials were, to some extent, influenced by their architect. All that plaintiff did in that direction, as well as what he did in preparing studies for the interior of the proposed building, was in the line of his duty and employment.

Much has been said on the trial in regard to the right of the plaintiff to adhere to his own plans as an architect of this building. I only remark in regard to this, Mr. Tilley was not employed to get up wholly original designs; it became his duty to prepare plans and specifications on such designs as the city and county authorities should agree upon; whether they were his designs or borrowed from somebody else, made no differerence to him under the terms of this employment; it was his duty to prepare plans and specifications, and he had no right to insist on his own plans in contradistinction to any other, however humiliating it might have been to his professional pride.

I have no doubt it would have been his duty to prepare plans and

specifications, and construct the building after the design of Egan, if the city authorities had directed him so to do.

It is probable that the mistake made by both the county and city authorities, after having agreed to construct a building of uniform design, was in attempting to have two architects for the building making it an almost inevitable necessity that one of these architects must to some extent yield to the other.

In this connection I have some views, although it is not necessary to definitely charge you on that point, that if the county had made up its mind to proceed with the construction of the county portion of the
60 building, and the city was not ready to proceed, that the county might have a right under the contract to fix plans if the city was not ready to proceed.

The plaintiff has no right to place himself upon his professional dignity and refuse to co-operate with the county architect in this matter of the adoption of plans. I do not say that he did so.

I say there is some proof tending to show that he did so, and it is for you to say whether you are satisfied from the proof that he did so. He was employed, like any other employee of the city, to do a certain thing; he was as far as possible to contribute his professional skill in the suggestion of plans which might or might not be adopted, and when a design was adopted to prepare drawings and specifications for the construction of the building.

It may be considered as undisputed that the plaintiff was employed to prepare plans and specifications and did some work in the line of his employment, and for this he is entitled to compensation as far as possible at the rate for which he was to do the whole work under the contract. That is to say he had agreed to prepare plans and specifications and superintend the entire construction of the building for $37,500.00. He did a part of that work; he did something in the line of his duty and if it is possible to ascertain from the proof and contract how much his compensation should be for the work done in the ratio of the entire compensation, the jury should arrive at that.

The testimony shows that he did some work in suggesting designs, both for the interior and exterior of the proposed building; and
61 that he also prepared specifications for and superintended the excavations for the foundation and sub-basement.

The question is what proportion of the compensation which was to be paid for the whole work should be allowed for what he actually did. This it is your duty to determine, from the evidence in the case.

The plaintiff is not authorized because of the refusal of the city to allow him to complete the contract to abandon the contract price for what he did do, and recover pay upon the scale of prices charged by architects when no contract is made, if by the proof you can fix the contract price, even approximately, for the work actually done.

The contract between the plaintiff and the defendant involved not only the professional skill of the plaintiff in the matter of design, so far as suggestions might go or be asked for, but also the preparation of plans and specifications and working drawings, etc., and the supervision of this building during the entire period of its construction.

It was to be a public building. It was to be a large building, covering half of one of our city blocks; and it is admitted that several years would be consumed in its construction, even if pushed to the utmost extent. The county building was begun in the fall of 1875, and it is not yet finished.

The city building was commenced in the fall of 1877, and it is not yet

half way up, as has been conceded on trial; so that from the testimony in the case you can get some idea of the length of time which it might have been reasonably expected it would take the plaintiff to earn
62 this sum of money; and also you have evidence in the case tending to show the length of time which he was actually employed in and about the preparation of these plans; some of the time, as I have suggested, was put in unwarrantably by the plaintiff in the preparation of elaborate plans and drawings, when a mere design was all he was called upon to make at that time, or a mere sketch or study.

In addition to the compensation for the work done at contract price, as far as it can be ascertained from the proof the plaintiff would also be entitled to damages for the breach of the contract, if the proof shows that he has been ready and willing to perform the contract. The trouble about this branch of the plaintiff's case is, it furnishes no criterion for the measure of these damages.

The plaintiff is not authorized to sit down and fold his hands in idleness after the city had refused to allow him to go on with the supervision of the work. It was his duty to seek other employment, and then the measure of his damages would have been the difference between the amount which the city was to pay him and what he was able to earn from other sources. That is to say, there is a distinction between damages for breach of contract for the employment of personal services and damages upon breach of contract upon the sale of goods. If you agree to sell a man a horse or wagon at a specified price, you tender him the article and demand your money, and from that time on the measure of your damages is the purchase price, because you have performed, as far as it was possible for you to do so, the contract; but if you
63 agree with a man to perform certain specific services for you for a year and he works for only part of the time and you discharge him, even unwarrantably, the measure of his damages for the breach of that contract is not the full compensation for the year, but compensation at the contract rate for the time he did work, and in addition thereto the damages which he sustained by not being able to earn as much by working for anybody else, and his duty is to seek other employment, and then the difference between what he would have earned if he worked for you and what he was, in fact, able to earn by working for others constitute the measure of his damages.

But this case furnishes no criterion for the application of this rule, because the plaintiff does not show he sought other employment, or how much he was able to earn; then, too, with reference to the facts in this case, there was a sort of *of* resting spell, so to speak, between the fall of 1875 and the spring of 1877, during which the city took no steps towards proceeding with the construction of the building, although, as I have already stated, the order of August 9th, 1875, seems to contemplate proceeding immediately with the construction of the building, yet the proof shows there was no money to carry out that plan. During this time the plaintiff might have sought other employment. He is not authorized to charge the defendant all the time. He had no right to sit down and say I will wait until the city is ready and charge them
64 at this rate for my services, but ought have sought other employment and turned his attention to other matters until the city was ready to proceed, and then it was time enough to render his services and also to proceed with the performance of the contract.

If the plaintiff was at all times ready to prepare plans, when plans and designs should be adopted, and to proceed to supervise the construction of the work whenever the city should proceed to build; that

is, if he held himself at the service of the city, then the time which he spent waiting for the action of the city may furnish some criterion of standard by which to estimate the amount to be allowed to the plaintiff.

The question, then, for you to solve is how much the plaintiff is entitled to have for what work he did for the city under this employment, excluding from your consideration any damages by reason of breach of the contract, because, as I have said, there is no foundation laid for such damages.

This a question of fact for you to solve in the light of the evidence.

To the following part of the above charge the defendant then and there excepted:

"There is no provision in the contract, or in any of the subsequent dealings or relations between the parties that shows how this sum was to be paid, but I think the fair presumption is, inasmuch as it was expected that the completion of the work would extend to a long term of years, perhaps, that the plaintiff was not to wait until the entire completion of the work before he received some compensation, and
65 that he was to be paid from time to time upon some basis to be established, so that when the work was done he should not have received more than the aggregate am'nt of his compensation."

And also to the following:

"I do not intend to be understood as saying that all the plaintiff had done on this first set of plans was unauthorized, because, to a certain extent, the interior plans had to be designed or suggested, and the work in that direction was probably to some extent, if not wholly, available in the second set of plans."

Also to the following part:

"Yet when he was called to produce a plan for the joint meeting, whatever the plans were worth as studies, he was fairly entitled to compensation, for it was in the line, in other words, of his employment and duty. The plaintiff had made designs for alterations, and it is presumable the ideas of the city officials were to some extent influenced by their architect."

Also to the following part:

"He was employed, like any other employee of the city, to do a certain thing; he was, as far as possible, to contribute his professional skill in the suggestion of plans which might or might not be adopted."

Also to the following part:

"It may then be considered as undisputed that the plaintiff was employed to prepare plans and specifications, and did some work in the line of his employment; for this he is entitled to compensation, as far as possible, at the rate for which he was to do the whole work
66 under the contract; that is to say, he had agreed to prepare plans and specifications, and superintend the entire construction of the building, for $37,500.00.

"He did a part of that work. He did something in the line of his duty, and if it is possible to ascertain from the proof and contract how much his compensation should be for the work in the ratio of the entire compensation, the jury should arrive at that."

Also to the following part of said charge:

"The question then for you to solve is how much the plaintiff is entitled to have for what work he did for the city under this employment, excluding from your consideration any damages by reason of breach of the contract, because, as I have said, there is no foundation laid for such damages."

And thereupon said jury gave their verdict against the defendant.

Whereupon the counsel for the defendant moved for a new trial, but the court overruled said motion and gave judgment against the defendant on the verdict of the jury, to which the defendant then and there excepted.

And inasmuch as the matters aforesaid do not appear of record, the counsel for the defendant presents this bill of exceptions, and prays that the same may be signed and sealed by the court, and made a part of the record in said cause, which is accordingly done.

H. W. BLODGETT,
Judge. [SEAL.]

67 (Endorsed:) Filed April 5, 1880. Wm. H. Bradley, clerk.

And afterwards, to wit, on the 20th day of September, A. D. 1880, said defendant, The City of Chicago, by its solicitors, filed in said clerk's office its bond in said entitled cause, which said bond is in the words and figures following, to wit:

Bond.

Supreme Court of the United States.

THOMAS TILLEY
v.
THE CITY OF CHICAGO.

Know all men by these presents that we, The City of Chicago, as principal, and F. A. E. Maas, surety, are held and firmly bound unto Thomas Tilley in the penal sum of twenty-six thousand dollars, to be paid to the said Thomas Tilley, his executors or administrators, to which payment, well and truly to be made, we bind ourselves and each of us jointly and severally by these presents.

In witness whereof the said city of Chicago has caused these presents to be executed by its mayor and comptroller, attested by the seal of the city, and the said F. A. E. Maas, surety, has hereto set his hand and seal this 13th day of September, A. D. 1880.

Whereas the above named city of Chicago hath prosecuted a
68 writ of error to the Supreme Court of the United States to reverse the judgment rendered by the circuit court of the United States for the northern district of Illinois in the above-entitled suit:

Now, therefore, the condition of this obligation is such that if the above-named City of Chicago shall prosecute its said writ of error to effect, and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

CARTER H. HARRISON,
Mayor of the City of Chicago.
THEODORE T. GURNEY,
City Comptroller of Chicago.
F. A. E. MAAS.

Attest:
[SEAL.]
P. J. HOWARD,
City Clerk.

Approved:
H. W. BLODGETT, *Judge.*
SEPT. 20, '80.

(Endorsed:) Filed September 20, 1880. Wm. H. Bradley, clerk.

69 NORTHERN DISTRICT OF ILLINOIS, *sct:*

I, William H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein Thomas Tilley was the plaintiff and the City of Chicago was the defendant, as the same appears from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this 14th day of October, A. D. 1880, and of our Independence the 105th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

70 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said circuit court between Thomas Tilley and the City of Chicago in an action of assumpsit a manifest error hath happened, to the great damage of the said city of Chicago, as by its complaint appears; and it *is* being fit that the error, if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1880, in the Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this tenth day of April, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the 104th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

(Indorsed:) Supreme Court of the United States. Thomas Tilley vs. The City of Chicago. Writ of error.

71 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

To Thomas Tilley, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, A. D. 18 , pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein the City of Chicago is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Henry W. Blodgett, presiding judge, this 13 day

of September, in the year of our Lord one thousand eight hundred and eighty.

H. W. BLODGETT, *Judge.*

72 Service of the within citation admitted this 13th day of September, 1880.

M. W. KELLER,
Att'y for Defendant in Error.

(Indorsed:) Supreme Court of the United States. The City of Chicago, plaintiff in error, vs. Thomas Tilley, defendant in error. Citation. To October term, A. D. 1880.

(Indorsement on cover:) No. 1034. The City of Chicago, plaintiff in error, vs. Thomas Tilley. N. Illinois C. C. U. S. Filed 18th October, 1880.

OFFICE SUPREME COURT U. S.
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JAMES H. McKENNEY, Clerk.

IN THE

SUPREME COURT OF UNITED STATES.

THE CITY OF CHICAGO,
Plaintiff in Error,
vs.
THOMAS TILLEY,
Defendant in Error.

Error to the Circuit Court for the Northern District of Illinois.

ARGUMENT FOR PLAINTIFF IN ERROR.

JOHN N. CRAWFORD,
For Plaintiff in Error.

BEACH, BARNARD & CO., LEGAL PRINTERS, 104 RANDOLPH STREET

IN THE

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THE CITY OF CHICAGO,
Plaintiff in Error,
vs.
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Error to the Circuit Court for the Northern District of Illinois.

STATEMENT.

This is a writ of error to a judgment rendered in the Circuit Court for the Northern District of Illinois.

The action was assumpsit, brought by the defendant in error, against the City of Chicago, to recover the sum of $37,500, upon a special contract. The declaration also contains the common counts, and claims damages thereon in the sum of $110,000.

The following facts are disclosed in the record:

On the 28th of August, 1872, the City of Chicago entered into a contract with the County of Cook, for the joint occupancy of the court house square known as block 39 in the City of Chicago, whereby it was agreed that "the said parties shall join in the erection of a public build-

"ing in said block 39, for the use of the county and city "governments respectively, and the courts of record of said "county."

"The general exterior design of said building shall be of "a uniform character and appearance, as may hereafter be "agreed upon by the Board of County Commissioners, "and the Common Council of the City of Chicago."

"That portion of said building, situate west of the "north and south center line of said block, shall be erected "by the City of Chicago, at its own expense." (See Record, p. 13).

In June, 1875, the county being ready to proceed with its portion of the proposed building, appointed James J. Egan as its architect, who entered upon the preparation of plans, and the construction of the foundations for the county's portion of said building.

On the 9th of August, 1875, the Common Council passed the ordinance and order which are the foundation of this controversy, and which will be found in full in Record p. 8.

The ordinance repeals all former ordinances, orders and resolutions of the council, pertaining to the erection and construction of the city's portion of the new City Hall and Court House, and rescinds all former action as to the appointment of architects, and expressly provides that "noth- "ing in this ordinance shall be construed as to in any "manner affect, or in anywise rescind, impair or amend "any contract or other agreement now subsisting between "the City of Chicago and the County of Cook."

The material portion of the order as passed is as follows:

"*Ordered*, that one architect shall be appointed, whose "duty it shall be to prepare the necessary plans and speci- "fications for the erection of the city's portion of a new "City Hall and Court House, upon Block 39, in the

" Original Town of Chicago, commonly known as the " Court House Square, and the general exterior design of " the same to be of a uniform character and appearance, as " shall be agreed upon by said architect and Board of " Public Works and said County Commissioners, said archi- " tect, when the plans and specifications shall have been " prepared by him, and agreed upon by said board, to take " charge of and superintend the construction of said build- " ing to its completion under the direction and control of said " Board of Public Works, and said architect shall also do " and perform every other service or thing necessary to " be done, in and about the construction and erection of " the city's portion of said building to completion, which " shall be required to be done and performed by him as " such architect, by said Board of Public Works, and said " architect shall receive from the City of Chicago as his full " compensation for his entire services as such architect the " sum of $37,500, said sum being 3 per cent. of the sum of " $1,250,000, which shall be the entire cost of the city's " portion of said building; and such compensation shall be " in full for all services of such architect, and no other or " further compensation whatever shall be paid to him by " said city."

The order further provides that, whenever " the plans " and specifications shall be agreed upon in manner afore- " said," the Board of Public Works shall proceed with the city's portion of said building.

Immediately following the passage of the foregoing ordinance and order, the council proceeded to the election of an architect to act under and in pursuance thereof, and the defendant in error was duly elected such architect.

On the 24th of August following, the defendant in error was officially notified of his selection as architect, and on the same day notified the city officials of his acceptance,

and offered to enter into a written contract and give bond, but these were dispensed with.

The defendant in error at once entered upon the preparation of plans for the city's portion of the proposed building, and submitted the same from time to time up to about the middle of November following to the Board of Public Works and various other city officials. It does not appear that he in any way submitted them to the Board of County Commisioners. About November 12, 1875, the correspondence between Mr. Tilley, the defendant in error, and Mr. Egan, the County Architect, occurred, which shows that wide differences existed between the plans of the two architects as to the exterior designs for the building. (See Record, p. 16.) In the meantime certain preliminary work—such as making plans for the excavations for the foundation and superintending the same—had been performed by the defendant in error.

On the 15th of November, 1875, the Common Council passed a resolution inviting a joint meeting of the Mayor, the Board of Public Works, the building committee of the Common Council, the President of the Board of County Commissioners, and the building committee of the County Commissioners, to consult as to some feasible plan by which the differences arising between the city and county architects might be judiciously settled. This joint meeting was held, the architects were present with their plans, and explained them to the officials in attendance. The action of this first meeting was a reference of the matter to the Board of Public Works, to report at a future meeting. The next meeting was held on the 30th of November, or 1st of December, at which time the Board of Public Works made the report shown on page 17 of the record. At this meeting the joint committee directed the architects to prepare a compromise plan for the exterior of the building, and adjourned to meet on the 11th of De-

cember following, at which time the architects were to present their joint plan. It seems to have been understood that the architects were to meet and prepare the plan together, but they did not do so, and some recriminations were indulged in, as to where the fault lay for such default. The evidence on this point is shown in the record, pages 10 and 21.

On the 4th of December, a few days after this last meeting of the joint committee, the defendant in error addressed a communication to the Board of Public Works, and, on the 6th of December, sent a copy of the same to the Common Council. (Rec., pp. 17–20.)

On the 11th of December, the joint committee re-assembled, and Mr. Egan presented sketches of a plan, but Mr. Tilley presented no plan, and did not concur in the one presented by Mr. Egan.

After an examination and discussion of Egan's plan, it was adopted by the joint meeting, and the county authorities proceeded at once to act upon it. They made considerable changes in the foundations of the county's portion of the building, to conform to the new plan, and largely increased the expense thereof by so doing. They have since erected their building in accordance with that plan. (Rec., p. 21.)

The Board of Public Works reported the result of this joint meeting to the Common Council, in their written communication of December 13th. (Rec., p. 20).

After this last joint meeting, the defendant in error prepared, what he called, a "compromise plan," which he communicated to the Council, and on the 13th of January, 1876, at a special meeting, the Council passed the resolutions as shown on page 11 of the record, which in effect directed the Board of Public Works to adopt the compromise plan of the defendant in error, and asked the County

Commissioners to concur in the action of the Council in adopting the said compromise plan. This plan also differed in exterior design, from the one prepared by Mr. Egan. (Rec., p. 22).

After this meeting of the Council, the defendant in error proceeded to complete his "compromise plan," so that in the early spring of 1876, his plans were in such a shape that he could have commenced the construction of the building; that he offered his services to the city, from time to time, but they were refused. That it was not until September, 1877, that the city was financially able to proceed with the erection of its part of the building, at which time the defendant in error again tendered his services, but they were again refused.

When the city was ready to commence its part of the building, it purchased plans from Mr. Egan, the county architect, in exterior design harmonious with the county part, and have since continued the erection of the same on those plans, under the superintendence of a city official, called the Superintendent of Public Buildings, who is an architect.

The defendant in error never tendered his plans to the city, nor has the city used his plans or designs in the construction of its building, and it was shown in the evidence that plans prepared by an architect are the exclusive property of the architect, and not of the client, who employs him.

It was further shown that the customary mode of charging by architects, was by percentage on the cost of the building, and that this percentage ranged from one to five per cent. for the various descriptions of designs and plans, and that the two sets of plans (which were brought into court and exhibited), were worth two per cent. each on the estimate cost. (Rec., p. 13).

It was also shown that the Common Council, in June, 1874, in the appropriation ordinance, made an appropriation for the year ending June 30, 1875, of $611,000, for the construction of the city hall, and in June, 1875, made the same appropriation for the year ending June 30th, 1876.

It was agreed that the City of Chicago became incorporated May 3, 1875, under the general incorporation law of Illinois, entitled: "An act to provide for the incorporation "of cities and villages." Approved April 10, 1872.

Assignment of Errors.

1. The court below erred in charging the jury: "There "is no provision in the contract, or in any of the subse- "quent dealings or relations between the parties, that "shows how this sum was to be paid, but I think the fair "presumption is, inasmuch as it was expected that the "erection of this work would extend to a long term of "years, perhaps, that the plaintiff was not to wait until "the entire completion of the work before he received "some compensation, and that he was to be paid from time "to time upon some basis to be established, so that when "the work was done he should not have received more "than the aggregate amount of his compensation."

2. The court erred in charging the jury: "I do not in- "tend to be understood as saying that all the plaintiff had "done on this first set of plans was unauthorized, because, "to a certain extent, the interior plans had to be designed "or suggested, and the work in that direction was proba- "bly to some extent, if not wholly, available in the second "set of plans."

3. The court erred in charging the jury: "Yet when "he was called to produce a plan for the joint meeting, "whatever the plans were worth as studies he was fairly "entitled to compensation for. It was in the line, in other "words, of his employment and duty. The plaintiff had "made designs for elevations, and it is presumable the "ideas of the city officials were, to some extent, influenced "by their architect."

4. The court erred in charging the jury: "He was em- "ployed, like any other employe of the city, to do a cer- "tain thing. It was, as far as practicable, to contribute

" his professional skill, and the suggestion of plans, which " might or might not be adopted."

5. The court erred in charging the jury: " It may then " be considered as undisputed that the plaintiff was em- " ployed to prepare plans and specifications, and did some " work in the line of his employment, and for this he is enti- " tled to compensation, as far as possible, at the rate for which " he was to do the whole work under the contract; that is to " say, he had agreed to prepare plans and specifications " and superintend the entire construction of the building " for $37,500. He did a part of that work. He did some- " thing in the line of his duty; and if it is possible to as- " certain from the proof and contract how much his com- " pensation should be for the work, in the ratio of the en- " tire compensation, the jury should arrive at that."

6. The court erred in charging the jury: " The ques- " tion, then, for you to solve is, how much the plaintiff is " entitled to have for what work he did for the city under " this employment, excluding from your consideration " any damages by reason of breach of the contract, be- " cause, as I have said, there is no foundation laid for such " damages."

ARGUMENT.

The contention of the plaintiff in error is this, that the order of the council of August 9, 1875, and the acceptance by the defendant in error under it, constituted a contract between the city and the defendant in error, which was entire and indivisible ; that it contained the condition precedent that the defendant in error would procure the agreement to, or acceptance of, his plans or designs by the county commissioners of Cook County, and that they should also be agreed to by the board of public works of the city ; that the performance of this condition was neither prevented by the city, nor waived by it ; that the defendant in error never performed this condition, and is, therefore, not entitled to recover damages against the city, either upon the special contract or upon a *quantum meruit*.

There is nothing in the record, and there is nothing, in fact, to show that the failure of the defendant in error to perform his contract was due to anything else than his own wilfullness, or perhaps ambition.

The city authorities were marched from time to time to his rooms to inspect the plans, and asked to make suggestions as to the accommodations of the different offices, and whatever information or assistance he required seemed always to have been given. No city official prevented him from consulting with the county architect, or from agreeing with that person as to the "exterior design" of the building, which was the chief thing upon which the architect and the county were to agree. The city and the county having entered into a contract whereby they were to build a city hall and court house which should be as one building, "harmonious in exterior design," the duty of the defendant in error, under his contract was, first of

all, to come to an agreement with the board of county commissioners as to this "design." This was the only point upon which it was necessary for him to obtain their acquiescence, for the interior plans of the two buildings were entirely different, and to be used for different purposes, and it was not necessary for the county board to agree about them.

There is nothing in the record to show that the defendant in error ever attempted to arrive at an agreement with the county authorities. On the contrary, it is clearly shown that, upon his acceptance, he went to work on elaborate plans, without regard to harmony of "exterior design" with the county side; that he worked months, and expended money with very little regard to what the county was doing; that he finally submitted his plans to the joint meeting of the city and county officials, held in pursuance of the council's resolution of November 15th, and at one of those meetings his plans were rejected. He chose to pursue that course. He chose to run the risk, after expensive and elaborate plans had been prepared, of securing the agreement of the county commissioners to his designs. He failed to secure that agreement, and his plans became worthless, not only to the city, but to himself.

After this he was requested by the joint meeting of city and county officials, to enter upon the preparation of a joint plan with the county architect, but, as shown by his communication of December 4th, written a few days afterwards, he went into consultation with his legal advisers, and the terms of that communication unmistakably show that he intended to stand by his plans, and force the county, if possible, to agree to them. When the time of the adjourned meeting came, he had no plans to present, and the county officials adopted a plan, and proceeded with their building. But even after all this, to show the spirit with which the city treated the defendant in error, the city

council endeavored to get the county to agree to the plans of the defendant in error, but did not succeed.

It is not intended in this argument to discuss the facts of the case, which we know are within the sole domain of the jury, but where, under the instructions of the court below, the verdict does not clearly show what particular facts it was necessarily based on—those facts which appear to be incontestible, and which are disclosed in official documents written at the time, may very well be weighed and considered by this court. And we think that those facts show, if they show any thing, that the sole blame lay with the defendant in error, that the contract into which he had entered with the city, was not fulfilled.

The errors assigned go to three points:

I. *The construction of the contract.*

II. *The relation of the parties.*

III. *That a recovery could be had upon a quantum meruit.*

I.

The construction of the contract.

The contract being in writing, its construction is solely within the province of the court. It was formed by a proposition on the part of the city of what it desired, and what it was willing to pay, and by an acceptance on the part of the defendant in error. The order of the council specifies the various things to be done, and then provides, that "Said "architect shall receive from the city of Chicago, as his "full compensation for entire services as such architect, "the sum of $37,500."

The charge of the court upon this part of the contract, and upon which error is assigned, is as follows:

"There is no provision in the contract, or in any of the "subsequent dealings or relations between the parties, "that shows how this sum was to be paid, but I think the "fair presumption is, inasmuch as it was expected that "the completion of the work would extend to a long term "of years, perhaps, that the plaintiff was not to wait un- "til the entire completion of the work, before he received "some compensation, and that he was to be paid from "time to time, upon some basis to be established, so that "when the work was done he should not have received "more than the aggregate amount of his compensation."

In this instruction we think there is manifest error. It in substance instructs the jury that this contract, which on its face is entire, and which provides for the payment of a round sum for complete services, is divisible and not entire, because by some future arrangement, "some basis to be established," the parties may change or modify their contract, so as to render the consideration severable.

The court bases this construction upon a "fair presumption" that such would be the future arrangement between the parties, but we think a fairer presumption is, that the parties meant precisely what was expressed in the order as passed by the council, and accepted by the defendant in error. There is nothing in the nature of things to show that the arrangement as expressed should not be carried out, and there is everyhing in the circumstances of the case to show that the city might very well desire to pay for the services upon their completion, for it appears in the record, that at the time this contract was made the city treasury was empty, and the building could not proceed on that account.

A contract is not to be construed by presumptions or the accidents of the future, but the intention of the parties is

to be discovered, by considering the meaning of the language they have employed.

Lowber v. *Bangs*, 2 Wall., 728.
Graves v. *Legg*, 9 Exch., 709.

The general rule of law is, that if the consideration to be paid is single and entire, the contract must be held to be entire, although the subject of the contract may consist of several distinct and wholly independent items.

2 Parsons on Contracts (6th ed.), 519.

The work to be done and the sum to be paid being both specified, it is clear that the court and jury can have no right to apportion that which the parties themselves have treated as entire, and to say that the consideration shall be paid in installments, contrary to the agreement, instead of in a round sum as provided by the agreement. In contracts where services are to be performed on one side and money to be paid on the other, and nothing is said as to the time of payment, no payment is due until the whole work is done.

Langdell's Cases on Contracts (2d ed.), 1059.
Cunningham v. *Morrell*, 10 Johns. 203.
Grant v. *Johnson*, 5 N. Y., 247.
Cadwell v. *Blake*, 6 Gray, 402.
Miner v. *Bradley*, 22 Pick., 457.
Champlin v. *Rowley*, 18 Wend., 187.

The contract being entire, the defendant in error is bound to the performance of the whole of it, before being entitled to compensation, unless performance has been waived or prevented by the plaintiff in error. But the court below, in the parts of the charge on which errors have been assigned, ignores this principle and assumes that if the defendant in error has done something in the line of his employment or duty, he is entitled to compensation for that.

When there is an entire executory contract, which the

plaintiff has not performed, and from the performance of which he has not been excused by any act of the defendant, he can recover nothing either in general or special assumpsit.

2 Smith's Leading Cases, notes to *Cutter* v. *Powell.*
Badgley v. *Heald*, 9 Ill., 64.
Angle v. *Hanna*, 22 Ill., 429.
Mears v. *Nichols*, 41 Ill., 207.
Railroad v. *Lent*, 63 Ill., 288.

It seems like pedantry to cite the cases on this question. The principle remounts to the old case of *Paradine* v. *Jane*, Alleyn 26, sometimes called Prince Rupert's case. There the plaintiff brought his action for rent due upon a lease. The defendant pleaded "that a certain German "prince, by name Prince Rupert, an alien born, and "enemy to the kingdom, had invaded the realm with an "hostile army, and with the same force did enter upon "the defendant's possession. and him expelled and held out "of possession, whereby he could not take the profits."

This was set up as a defense against paying the rent. But the plea was resolved to be insufficient for the reason, that "where the law creates a duty or charge, and "the party is disabled to perform it, without any default "in him, and hath no remedy over, then the law will ex- "cuse him; but when the party by his own contract cre- "ates a duty or charge upon himself, he is bound to make "it good if he may, notwithstanding any accident by in- "evitable necessity, because he might have provided "against it by his contract." This is the leading case, and its pregnant sentences have been quoted over and over as the best possible statement of the law, and they have ever since been applied to the constantly varying changes of human life and business affairs. The cases of *Jones* v.

Dermott, 2 Wall., 1, which involved a building contract, and *The Harriman*, 9 Wall., 161, which involved a charter party, are equally based upon *Paradine* v. *Jane*, and upon those cases, we confidently rest this branch of our case.

The defendant in error undertook to prepare plans and specifications which should be agreed to by the board of county commissioners of Cook county, and whether the failure to perform this covenant was due to the fault of the county board or the county architect, or to any person, other than the city, makes no possible difference. He did not obtain that consent. That the obtaining of this consent was a vital point in the contract between the city and the defendant in error cannot be denied, for the contract between the city and the county required harmony of "exterior design," and this was never lost sight of by the city, as may be seen by the ordinance and order of August 9, 1875, where the original contract between the city and the county is expressly mentioned (Record, p. 8).

In *Bettini* v. *Gye*, L. R. 1, Q. B. Div., 183, Mr. Justice BLACKBURN well defines a condition precedent to be "a "stipulation that goes to the root of the matter, so that a "failure to perform it would render the performance of the "rest of the contract by the plaintiff a thing different in "substance from what the defendant had stipulated for."

See, also, *Clarke* v. *Watson*, 18 C. B. (N. S.) 278, and *Hoare* v. *Rennie*, 5 Hurl. & Nor., 19.

Can there be any doubt that if the defendant in error had gone on and erected a building according to his plans, but that it would have been an entirely different building from what was intended by the city authorities?

But it was also stipulated that the board of public works should agree to the plans and specifications prepared by the defendant in error, and this they never did. They

never agreed to or adopted them in any way, whatever preference or liking they may have expressed for them. The official report of the board, at the council of December 13, 1875 (Record, p. 20), conclusively shows this. That it was necessary to obtain their agreement was as essential as to obtain the agreement of the county board.

Veazie v. *Bangor*, 53 Me., 50.
Gibson v. *Cranage*, 39 Mich., 49.
Zaleski v. *Clark*, 44 Conn., 218.

II.

The relation of the parties.

The court charged the jury that the defendant in error "was employed, like any other employe of the city, to do "a certain thing; it was, as far as possible, to contribute "his professional skill in the suggestion of plans which "might or might not be adopted."

The vice of this instruction lays in its indefiniteness and ambiguity, and consequent tendency to mislead the jury. The city, like all corporations, is served by officers, who manage the various departments of the government, and by clerks and other subordinates, who assist their superiors. There is also the vast army of contractors who carry forward, upon agreement, the multiplicity of labors necessary to be performed.

That the defendant in error was an officer of the city, was not contended for in the court below, and probably will not be here, but we call the attention of this court to the following sections of the Constitution and the General Statutes:

"An office is a public position, created by the constitu-"tion or law, continuing during the pleasure of the appoint-

"ing power, or for a fixed time, with a successor elected "or appointed."

Constitution of 1870, Art. V, Sec. 24.

The general incorporation law of the State, under which the city of Chicago is incorporated, contains the following provisions:

"OFFICERS. Sec. 1. There shall be elected, in all cit- "ies organized under this act, the following officers, viz : "a mayor, a city council, a city clerk, city attorney, and a "city treasurer.

"Sec. 2. The city council may in its discretion, from "time to time, by ordinance passed by a vote of two-thirds "of all the aldermen elected, provide for the election by "the legal voters of the city, or the appointment by the "mayor with the approval of the city council, of a city "collector, a city marshal, a city superintendent of streets, "a corporation counsel, a city comptroller, or any or either "of them, and such other officers, as may by said council "be deemed necessary or expedient."

Revised Statutes (1877), Chap. 24, Art. VI.

As the defendant in error was neither elected by the people, nor appointed by the mayor, he does not come within these provisions.

The term employe, while it might be used to designate a contractor, is ordinarily, and in common speech, applied to the clerks and subordinates in regular employment, at stated salaries, in the departments. The defendant in error was certainly not one of these, for he received no salary, did not labor in the departments, but in his own private office, and acknowledged no superior, but the city council.

The defendant in error was a contractor with the city, in the broadest sense. His agreement was precisely such

as he would have made with a private individual. He was to be paid a per centage on the cost of the building, the mode in which all architects are paid, and it is submitted with confidence, that if under a similar agreement with a private individual he ought not to recover, then he ought not to recover in this case. If an architect made an agreement with a party about to erect a building, that he would prepare plans which would be satisfactory to some third person designated, he would have to satisfy that person, or he could not recover, unless the default was caused by the defendant.

Butler v. *Tucker*, 24 Wend., 447.
Blacksmith v. *Fellows*, 7 N. Y., 401.
Richardson v. *Mahon*, ~~4 I. R. C. P.~~ L. R. 4 C. P. Div. (Ireland) 486.

Hence we say, that the application of the term employe to the defendant in error, adding some description of his duties, tended to confuse the jury, and to cause them to lose sight of those facts in the case, showing non-performance of contract, without default of the city, upon which the city based its defense.

The defendant in error's own construction of his position towards the city is conclusively shown in the record. When he accepted the employment he offered to enter into a written contract, and give bond. (Record, p. 9.) And in this action he has declared upon the special contract.

III.

CAN THE DEFENDANT IN ERROR RECOVER UPON A QUANTUM MERUIT?

The concluding errors assigned go to this point.

The defendant in error, declared upon the special contract, adding also the common counts. If we have a proper

comprehension of the facts as shown in the record, cases already cited effectually dispose of the question.

In *Veazie* v. *City of Bangor*, 53 Me., 50, the plaintiff agreed, in writing, with the defendant to keep certain roads in good repair for the term of three years, to the acceptance and approval of the mayor, and the joint standing committee on streets and highways for the time being. It was *held*—

1. That such acceptance and approval was a condition precedent to any right to recover payment.

2. That the use of the roads by the public was no acceptance or waiver on the part of the city.

3. That the plaintiff could not recover either on the special contract or a *quantum meruit*.

But there is no need of an array of cases on this question. It is hornbook law. We have called the attention of the court to the foregoing case, more particularly, because it is a city case, and seems applicable to all the points that are made in this case.

The Illinois authorities are to the same effect.

Mears v. *Nichols*, 41 Ill., 207.
Holmes v. *Stummell*, 24 Ill., 370.

While the defense made by the city was stated in terms to the jury, by the learned judge of the court below, the whole theory of the charge, (and the exceptions we have taken show this,) was that the plaintiff was entitled to recover something, and that all the jury had to do, was to ascertain how much this was.

We think the defense both valid and meritorious, and that the record clearly shows that, because of the errors assigned, the case should be reversed.

JOHN N. CRAWFORD,
For Plaintiff in Error.

W. C. GOUDY,
Of Counsel.

OFFICE SUPREME COURT U.S.
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JAN 22 1881
JAMES H. McKENNEY, Clerk.

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ARGUMENT IN REPLY FOR PLAINTIFF IN ERROR.

I.

We have but a few thoughts to suggest in reply to the argument for defendant in error.

Counsel say that the case presents questions of fact merely, and that these have been determined by the verdict of the jury. Were this indeed so, we certainly ought not to desire to be heard longer on this occasion. But we do not understand that the construction of a contract is a question of fact; and that the construction of a contract is involved in this case, is apparent, from the face of the record, from the exceptions to the charge, and from the able and ingenious argument of counsel for defendant in error.

The principal question made in the case is as to what was intended by the order of August 9, 1875.

Was the architect appointed under that order to draw elaborate plans for the exterior and interior of the proposed buildings, without reference to what the county was doing, or had done? If so, then the defendant in error, has discharged his duty, and is entitled to compensation. If he was only employed to prepare plans and specifications; and if this is all that the order of council means, then there is no error, in the assignments, made.

But we cannot so understand it. In the first sentence of the order we find that the plans and specifications prepared are to be in "the general exterior design of a uni-"form character and appearance *as shall be agreed upon* "by said architect and board of public works and said "county commissioners, said architect when the plans and "specifications for said buildings shall have been prepared "by him and *agreed upon* by said board to take charge "of," &c.

And in the next paragraph: "That whenever said "architect shall have been so appointed, and the plans and "specifications *agreed upon* in manner aforesaid," &c. (Rec., pp. 8 and 9.)

Here then there are no less than three several clauses of the contract requiring the agreement of the board of public works and the county commissioners, before action is to be taken with regard to the proposed building.

Undoubtedly the first thing about which there should be agreement was the "exterior design," and that is the first thing mentioned (Rec., p. 9). This was essential to enable the city to carry out its contract with the county. And it mattered nothing whether the city agreed with the county as to its "designs," or whether the county agreed to the city's.

It certainly did not lie with the defendant in error to champion the city in the matter. He was not employed for

that, but rather to come to some agreement with the county.

This agreement upon the exterior, as we urged in our former argument, is a condition precedent.

Counsel for defendant in error deny this, and say that the proposition makes its appearance for the first time on argument in this court, and is not really presented by either of the exceptions taken upon the trial.

The tenor of the propositions and arguments, used in the court below, cannot be considered in this court, as the record does not contain them, but it certainly is no objection to a proposition or argument, that it was not used in the court below, if it appears now to have any thing to sustain it in the record. But, as a matter of fact, the question was made in the court below.

We think the question as to whether this was or was not a condition precedent, could have been raised by demurrer to the first count of the declaration. In many of the cases cited in the argument in chief, the question is raised in that way. If this is so, it can be made now, as error on the face of the record.

But we think the exceptions taken abundantly raise the question, for the reason that the instructions excepted to are not consistent with the theory of the plaintiff in error, that there was a condition precedent to be performed by the defendant in error. Now this condition precedent was not, as counsel for defendant in error state (brief, p. 16), that Mr. Tilley "would secure the county's "consent to what the city desired;" nothing of the sort. It was simply that the county should agree to his "exterior designs," or plans, so that when the buildings were erected they should present that harmony of exterior that was intended by the contract between the city and the county. The city had no other desire, apparently, than

that of having a handsome building, and of coming to an agreement with the county in regard to it. The record most conclusively shows that the defendant in error never promoted this desire, nor attempted to. His first set of plans were prepared, submitted to the joint committee, and rejected. Here, properly, his contract and duties were ended. He had engaged to do a particular thing, and had not performed.

But he was requested to present another design in conjunction with the county architect. He did not do it. He says his failure was due to the fact that the county architect agreed to come to his office, but failed to come. Suppose that to be true; does that make the city liable for the already rejected plans? Certainly not. He failed to present a new plan in conjunction with the county architect. That was not the fault of the city. It may not have been his fault either. It may not have been the fault of any person, or it may have been the fault of conspirators against him. What of that? He did not do what he agreed to, and rendered no service of value to the city.

II.

But it is urged, with some indirectness certainly, but still made apparent, that Tilley's first set of plans were more ornate than Egan's, and that Egan's second set of plans were more ornate than his first ones, and that Egan profited by Tilley's first set of plans, and therefore Tilley's plans were of service to the city.

Now, there was nothing in the evidence, and there is nothing in the record to show this. It is true, the plans of the county in the first place bordered upon Doric plainness and simplicity, and it is also true, that the city officials desired something more of Corinthian elegance, and in the

joint meetings these matters were discussed, but to argue that because one set of plans were plain, and the next set more adorned, or ornamented, that the fashion of the ornamentation was necessarily taken from the defendant in error, is to argue very much at random. Much stronger is the inference that the ornamentation of the second set of plans was due to the discussion, on the point, that took place in the committee.

III.

But counsel urge, that what Mr. Tilley did, from the time he entered upon the contract, down to the time his services were dispensed with, or ignored, was done by direction of the board of public works.

But, as counsel very well show, in this argument, this board of public works "was in entire subordination to the "city council, and without the slightest independent "power." (Brief, pp. 5 and 17.) Or, as the circuit judge said: "It had no independent discretion." If this is so, and we do not seek to controvert it in this argument, the only authority the board of public works had to direct, was derivable from the same order from which defendant in error had power to act, namely, the order of Aug. 9, 1875, and before Mr. Tilley obeyed directions he should have made himself certain as to this power of the board to give directions.

If any directions were given, that increased the city's responsibility to Mr. Tilley, or in any way changed the terms of the contract, they certainly were without authority and the city cannot be hol len for them. We do not understand that any such directions were given, or acted upon, and we do not find in the record, anything to show that the board of public works ever acted towards the defendant in error

or toward the city, in any other than an advisory capacity. They were appointed by the city council, under the order of August 9, 1875, as any committee might have been appointed, to agree for the city as to the plans proposed by the architect. It was a duty necessary to be discharged by some one for the city. This duty they discharged by *not agreeing* to Mr. Tilley's plans as presented by him. This is conclusively shown in their written communications. (Record, pp. 17 and 20.)

IV.

Counsel speak in several places in their brief of the city's giving directions to defendant in error; p 16; "that the "plaintiff did a vast amount of work for the city under its "direction," p. 20; which would seem to imply that the city gave other or different directions than what is contained in the order of August 9, 1875.

If the counsel mean, by the term city, that the board of public works did this, then, as we have shown, it was unauthorized if not in harmony with the order of the council. If they mean that some other city official or authority gave the directions, it is not so shown by the record.

In short, we claim that the sole directions ever given by the city to the defendant in error, are contained in the order of August 9, 1875, and that whatever was done or left undone, must be determined by that order.

V.

We think the counsel for defendant in error labor under some misapprehension of the record, as to the action of the city counsel upon Mr. Tilley's plans.

The council never approved or sanctioned in any way,

directly or indirectly, the first set of plans. It had devolved the duty of approval or disapproval upon the board of public works, and it never took this authority away. It then passed the resolution of November 15, (Record, p. 10), calling the joint meeting to consult as to some feasible plan by which the difference between the city and county architects might be judiciously settled. At this meeting, as already show, Mr. Tilley's first set of plans were rejected. This was tantamount to an express rejection by the council, and that it was so considered, is shown by the fact that they were never brought forward again, never proposed to the city again, and never resurrected until this suit was commenced.

Now it was upon these plans, and upon these plans alone, that the court below instructed the jury to find for the plaintiff.

As to the second set of plans, the court below instructed the jury, in conformity with the theory of the plaintiff in error, that there could be no recovery for them at all.

So that all that is involved in this record and the exceptions taken, concerns the first set of plans.

Now the council afterwards on January 13, 1876, directed the board of pulic works to agree to the second set of plans of the defendant in error, and asked the county to concur also, but as the county did not concur this was the end of that action, and it only shows that the city was friendly to Tilley and desired him to succeed. But counsel seem to argue (brief pp. 16, 17) as if that action related back to the first set of plans, and that the instruction to the board of public works to adopt the second set of plans, was equivalent to instructing them to adopt the first set of plans; else we fail to understand why counsel should say, that the agreement by the board to the plans, "irrespective of the council, was immaterial," and that the cases cited are not

in point. We think it very material, and that the cases we cited, particularly *Veazie* v. *Bangor*, 53 Me., 50, very decidedly in point.

VI.

Counsel complain that our criticism on the first assignment of errors is mere "verbal criticism;" that with regard to the other "assignments," they are "torn" from the context; and that of the six errors assigned, but two are discussed specifically. The "assignments" certainly, in a sense, are torn from the context. Error cannot be assigned in this court upon the whole charge, and, according to the twenty-first rule, the exceptionable passages must be "torn" *totidem verbis* from the charge, or they will not be considered.

The criticism upon the first assignment is not "verbal" but of substance. Is this contract entire? If so the defendant in error must show performance, or a legal excuse; and the facts of performance, and legal excuse, must be submitted to the jury. Those facts were not submitted to the jury, for the court held the contract to be divisible and not entire. Counsel in their argument endeavor to support this view of the court by a citation from Addison on Contracts, Sec. 856. (Brief, pp. 10, 11.) The passage in Addison is based on the case of *Roberts* v. *Havelock*, 3 B. & Ad., 404. In that case the plaintiff had agreed to put a vessel in thorough repair, but no price or sum was named as the consideration. It was claimed by the defendant that the contract was entire, and *Sinclair* v. *Bowles*, 9. B. & C. 92 was cited as in point. Lord TENTERDEN said: "I have "no doubt that the plaintiff in this case is entitled to recov- "er. In *Sinclair* v. *Bowles*, the contract was to do a spe- "cific work for a specific sum. *There is nothing in the pre-*

"*sent case amounting to a contract to do the whole repairs,*
"*and make no demand till they are completed.*"

See note to *Cutler* v. *Powell*, 2 Smith's Leading Cases, (7 Am. Ed.) 32, where the learned editor comments on these cases, and where the position taken by the plaintiff in error in this case is abundantly sustained.

VII.

It is true, that in the opening argument for the plaintiff in error, the assignments of error were not discussed *seriatim*. That might have been a more desirable mode of presenting the case. We rather chose to present the case upon the law generally as laid down by the court, in the exceptions taken, and upon the conceded facts. We did not assign all the passages of the charge that we deemed exceptionable, but we assigned enough to show that the learned judge held:

1. That this contract was divisible.

2. That the agreement by the county to the plans of defendant in error, was not a condition precedent.

3. That it made no difference whether the Board of Public Works assented to the plans or not.

4. That the defendant in error was an ordinary employe of the city, who acted under the direction of superior officers, and was entitled to compensation for whatever he did.

5. That, although he made a special contract, he could recover on a *quantum meruit* without showing complete performance, waiver of performance, or default on part of the city.

All of which positions, on the facts disclosed in the rec-

ord, or as summarized in the judge's charge, we believe to be erroneous.

VIII.

Counsel urge that we are concluded on all the facts by the verdict of the jury (Brief, p. 9).

We think not. We are concluded on such facts as must be necessarily considered by the jury in making up their verdict, but on none others. The verdict was for $13,000 damages. Could it well be otherwise when the court expressly charged the jury as follows:

"The question, then, for you to solve, is, how much the "plaintiff is entitled to have for what work he did for the "city under this employment, excluding from your consid- "eration any damages by reason of breach of the con- "tract, because, as I have said, there is no foundation laid "for such damages."

No breach of the contract on the part of the city, and yet the plaintiff entitled to recover!

It being matter of law that the plaintiff was entitled to recover something, the verdict only determines the value of the work done, and upon such facts as were necessary to arrive at that conclusion the plaintiff in error is concluded.

We fully understand that if the court below had submitted the contentions of the plaintiff in error to the jury, that then the verdict would have been conclusive as to them. But they were not submitted, and could not be consistently with the instructions given. How, then, can it be said that the verdict concludes as upon all these facts?

Hence, as we said in the opening argument, these facts, which are disclosed in official and written documents pre-

pared contemporaneously with the events described, may well be considered by this court in determining the relations and the rights of the parties to this suit.

In conclusion we wish simply to call the attention of the court to a case erroneously cited in the argument in chief, at page 19. It should be

Richardson v. *Mahon*, L. R. (Ireland), 4 C. P. Div., 486.

Respectfully submitted,

JOHN N. CRAWFORD,
For Plaintiff in Error.

W. C. GOUDY,
Of Counsel.

IN THE

SUPREME COURT OF UNITED STATES,

THE CITY OF CHICAGO,
Plaintiff in Error,

vs.

THOMAS TILLEY,
Defendant in Error.

Error to United States Circuit Court, Northern District of Illinois.

Argument for Defendant in Error.

MELVILLE W. FULLER,
For Defendant in Error.

CHICAGO:
BEACH, BARNARD & CO., LEGAL PRINTERS, 104 RANDOLPH STREET
1881.

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Argument for Defendant in Error.

MAY IT PLEASE YOUR HONORS:

This case really presents questions of fact merely, and these have been determined by the verdict of the jury, and the judgment rendered thereon.

The errors assigned relate to certain specified portions of the charge of the Circuit judge, which charge is given in full on pages 22 to 31 of the printed record, and contains a sufficient statement of facts to enable this court to ascertain the exact relation the paragraphs complained of bear to all the evidence taken together, and to demonstrate, as we submit, that no error was committed of which the plaintiff in error, the defendant below, can complain.

The evidence for the plaintiff below will be found on pages 8 to 13 of the printed record, and is respectfully re-

ferred to in correction of the statement of facts by Mr. Crawford, in his brief for plaintiff in error, which statement omits allusion to testimony which we regard as important, and presents some parts of the record in an argumentative way calculated to obscure the real facts as we understand them to be, although we do not doubt that this is unintentional.

The case in brief is this: Prior to the great fire of October, 1871, the block of ground in the city of Chicago, known as the court house square, had been occupied by a building used as a city hall and court house, in which the business of the county and the city was conducted.

This building having been destroyed, the county and city entered into a contract for the construction of another, one portion to be built by and for the city exclusively and at its own expense, and the other by and for the county exclusively, and at its own expense, but to be of such uniform external appearance as might be afterwards agreed upon.

The county thereupon appointed one Egan as its architect, and he commenced the preparation of plans for the county's portion of the building and the city appointed the plaintiff, Thomas Tilly, as its architect, and he, in pursuance of directions from the city authorities, to that effect, prepared complete plans for the city's portion of the building.

The interior arrangements of the city's portion were necessarily required to be and were different from those of the county's portion as the uses to which they were to be put, were different.

The plans of the two architects did not, however, agree in external appearance, as was not unnaturally to have been expected. Therefore, on November 30th, 1875, a joint meeting of city and county officials was held, with a view of harmonizing the proposed exteriors, at which meet-

ing the county architect and the city architect produced and explained their respective plans.

The plaintiff's plans "*were more ornate externally* than "those of Mr. Egan (the county architect), *and in that re-* "*spect preferred by the city authorities.*" (P. Rec., p. 10.)

The result of this meeting was a direction to the architects to proceed and prepare a joint *compromise* plan for the exterior of the building, and the meeting adjourned until December 11.

The plaintiff (Tilley) then agreed with the county architect (Egan) to meet the latter on the next day, and unite in the preparation of a joint plan, but Egan *did not come*, and after plaintiff had waited for him several days, sent the plaintiff word that he would not meet him but would prepare a set of plans himself, and that plaintiff might do the same. (P. Rec., p. 10; Rec., p. 20.)

Thereupon plaintiff went to work getting up a set of compromise plans, but was unable to complete them, (presumably because of the time lost in waiting for Egan,) before the joint committee met again. At this meeting Egan presented sketches of a compromise plan *more ornate externally* than his first plan, and the plaintiff explained that he had not completed his sketches. The joint meeting recommended Egan's compromise plans to the city council and the county board, which latter board subsequently adopted them, but the city council did *not*, but, on the contrary, on the 13th of January, 1876, adopted the plaintiff's compromise plans which he had, in the meantime, completed. (P. Rec., p. 11.)

The plaintiff was then directed to prepare foundation and subbasement plans while the board of public works made another effort to bring about harmony between the Washington and Randolph street fronts of the proposed building by appointing a meeting between the county and

the city architect on Jan. 18th, which plaintiff attended, but the county architect *did not*. (P. Rec. p. 11.)

After the failure of the county architect to meet the city architect (the plaintiff) on Jan. 18th, the board of public works directed the plaintiff to go on and prepare the plans and specifications for the foundation and subbasement and the internal arrangements, which latter had to be completed in order to get the bearings, and plaintiff did so, but the board suspended the letting of the contract for the foundations "*until the treasury was in better shape*," (P., Rec. p. 12,) but told the plaintiff he might in the meantime complete the balance of the plans. (P., Rec. p. 12.)

Plaintiff did this, and fully completed entire plans for the building in accordance with the preliminary sketches approved by the council Jan. 13th, 1876, which plans were placed at the disposal of the city, though counsel says he did not "tender" them, although he admits Mr. Tilly was ready at all times to have proceeded with the construction of the building, but such construction was suspended, for, although proper appropriations were made, there was in fact no money in the city treasury to meet them and proceed with the work until September, 1877, and then when it was determined to go on, the then city authorities refused to allow plaintiff to officiate as architect, and determined to get along without any other architect than the city building inspector. (P., Rec. p. 12.)

Plaintiff adduced evidence of the value of the services work and labor, rendered, and of money paid out, etc., far exceeding, from any standpoint, the amount of the verdict, but as no question arises upon the damages, it is unnecessary to dwell on this branch of the case.

It was admitted that the city of Chicago became on the 3rd day of May, 1875, incorporated under the act of the general assembly of Illinois entitled, "An act to provide for

"the incorporation of cities and villages," approved April 10th, 1872. (Rev., stat. 1874, p. 209, chap. 24.)

The importance of that fact is this: Prior to May 3rd, 1875, the city of Chicago had been acting under a special charter under which the board of public works constituted an executive department of the municipal government with large and independent powers. (*Tuly's Laws and Ordinances*, chap. 6, p. 429.)

The adoption of the general law for the incorporation of cities and villages changed all this, and in effect abolished the board of public works, and although it continued to act until Sept. 18, 1876, (P. Rec., p. 15), it was in entire subordination to the city council, and without the slightest independent power. The circuit judge defines the situation correctly, when he says that "the board of public works was undoubtedly at that time only empowered to act, as it should be directed by the council. It had no independent discretion of its own."

ARGUMENT.

It is contended by plaintiff in error that the order of the city council of Aug. 9, 1875, and the acceptance by defendant in error of his election as architect constituted an entire and indivisible contract containing the condition precedent, that defendant in error would procure the acceptance of his plans *by the county board*, and that performance of *this* condition was neither prevented by the city *nor waived by it*, and that defendant in error never performed it, etc.

The record gives no color to this position. Under the order of Aug 9, 1875, the city architect was to "prepare the necessary plans and specifications for the erection of the *city's portion* of a new city hall and court house," and the general exterior design of the same was "to be of a uniform character and appearance, as shall be agreed upon by said architect and board of public works and said county commissioners," but the architect was to be wholly under the control of the board of public works and the city council, the ultimate authority, and upon no construction of the terms of the order itself whether now construed by the court or as *then* construed by the parties, can it be held that the architect contracted to procure the agreement of the county comissioners as a condition precedent to his being paid for doing what the city directed him to do.

The city had as much right to insist upon its views of what the exterior design should be as the county had. Because the contract between the city and the county called for uniformity of external design, that did not require the city to agree to whatever the county board might determine, and accordingly the defendant in error was directed by the board of public works to prepare complete plans of the city's portion, which he did. (P. Rec. pp. 9, 10.) But in August (P. Rec. p. 19) or the first of September, 1875

(P. Rec. p. 16), the county board adopted a plan of its own, and let the contract for the foundation work in October, 1875, which course of action, if persisted in, excluded the city from any participation in a joint plan by leaving it no alternative except to adopt the plan of the county, notwithstanding the contract between them contemplated that the plans should be jointly agreed upon.

This being the position of affairs in August, it is ridiculous to argue that it was a condition precedent that Tilly should prepare a design to which the county should agree, for the county had already adopted its own.

On the contrary, the city directed him to prepare plans, and if the exterior was more satisfactory to it than the one which the county had approved, then it was for the city to endeavor to bring about an agreement upon its own plan, or such modification as might be arrived at.

Hence, when Tilly's plans were completed, views were interchanged upon the subject, which resulted in the county receding from its plan so far as to adopt a compromise plan prepared by its architect which presented a more ornate exterior than his original plan, in that particular following the suggestions of Tilly's plans. The city was not, however, at this time satisfied with Egan's compromise plans, but preferred Tilly's second designs, which he had prepared at the city's direction, and the council adopted them, January 13, 1876. The city then renewed the effort to get the county to adopt them, or harmonize between the two, failing which, "resort would be had to the courts, as the city officials said they would not go back on their former action, nor tolerate the erection of two separate buildings on the court house square." (P. Rec., p. 20.)

The city architect did exactly what the city required him to do, and what he did was approved of by the city.

In every effort which the city made towards harmonizing with the county, he assisted; and so far from his letter of December 4th to the board of public works and the city council is concerned (put in evidence by the plaintiff in error, and to be found on pp. 17, 18, 19 of the printed record) indicating anything to the contrary, it demonstrates his good faith, and will well repay perusal. After a statement of the difficulties of the situation, he says, in conclusion (P. Rec., p. 20): "I desire, therefore, that the proper authority of the city shall determine my duty in the premises, that I may be advised how to proceed."

It is, of course, perfectly plain that the city preferred Tilly's plan and the county preferred Egan's. It is not true that Tilly's plan was ever rejected by the city, which on the contrary adopted it, but it is true that the joint meeting of county and city officials, having in itself no authority to bind either county or city, did Nov. 30th, direct the two architects to agree on a joint plan. But this joint action on their part was defeated, as the evidence on behalf of plaintiff below tends to show, by the refusal of the county architect to act with the city architect, which refusal came so late that the latter did not have time to complete independent compromise sketches of his own prior to the meeting of Dec. 11th, and which was not what he had been requested to do by the joint meeting. Whether or not Mr. Tilly used every effort so far as he was concerned, to harmonize the conflicting views of the city and county, as he insists he did, was purely a question for the jury. Equally erroneous is the assertion of counsel (brief p. 10,) that the "failure" of Mr, Tilly to perform his contract was due to his own wilfulness. There was no failure on his part. The city suspended for the want of money, and not on account of any difference in exterior design between the plans of its architect and those of the county architect.

There was never a time when the plans of the city archi-

tect could not be made to conform with those of the county, and when in September, 1877, after the city obtained money, and concluded to yield to the county in the matter of the exterior, the city architect offered to go on, his services were refused simply because the city, as the record states (P. Rec., p. 12), "decided to get along without any other architect than the city building inspector, who was an architect."

The theory of plaintiff in error that the defendant in error should receive no compensation for his services rendered under the direction of the plaintiff in error, because the arbitrary conduct of the county drove the city to finally concede to an exterior plan of which its judgment never approved, is simply monstrous.

All these questions of fact were submitted to the jury by the Circuit Court, and jndgment entered upon the verdict. The case of *First Unitarian Church* v. *Faulkner, et al.* 1 Otto, 415, is in point as giving the views of this court under similar circumstances.

The errors specifically assigned are alone to be considered, and to them we now turn our attention.

I.

It is insisted that the court erred in saying, among other things in the course of the charge, that "there is no provis-"ion in the contract, or in any of the subsequent dealings "between the parties, that shows how this sum was to be "paid, but I think the fair presumption is, inasmuch as it "was expected that the erection of this work would extend "to a long term of years, perhaps, that the plaintiff was "not to wait until the entire completion of the work before "he received some compensation, and that he was to be "paid from time to time upon some basis to be established, "so that when the work was done he should not have re-

"ceived more than the aggregate amount of his compen-
"sation."

(P. Rec., p. 21.)

This is the first error assigned.

It may be remarked that this part of the charge was in no respect calculated to mislead the jury, and that as the court subsequently instructed them that if plaintiff was entitled to recover at all, still it would only be for a proportionate part of the entire compensation, for what he actually did, the language complained of is quite immaterial.

The circuit judge was giving at this stage of the charge a sketch of the case. He was stating that the order of Aug. 9th and plaintiff's appointment thereunder constituted whatever "expressed contract" there was, and pointing out that for making plans and specifications, and for superintending the construction, plaintiff was to receive but $37,500 in all, being three per cent. on $1,250,000 (erroneously stated $1,500,000). the estimated cost of the city's portion of the building, and he then uses the language in question, and proceeds further to describe the operation of the order.

Now, even if the learned judge had not been strictly accurate in his view, that, taking all the circumstances into consideration, it was possible the plaintiff was to be paid from time to time as the work progressed, yet this was of no consequence if the plaintiff was limited in his recovery to compensation upon the basis of the proportionate part of the contract price, which would be unaffected by the question whether the compensation was payable in installments or not.

But the court was entirely correct in the views expressed. It is well settled, as is remarked by Mr. Addison in his work on Contracts (§ 856, 2d vol., p. 540), that "if "the work is in its nature divisible and apportionable, and

"there is nothing in the terms of the contract which, either "by express stipulation or necessary intendment, precludes "the plaintiff from recovering in respect of a partial execu- "tion of it, the plaintiff may, on performing a part only of "his engagement, require a corresponding part perform- "ance on the part of the defendant. Thus, where a ship, "being damaged at sea, puts into a harbor to receive some "repairs, and an agreement was made with a shipwright to "put her 'into thorough repair,' but nothing was said as "to the amount, or time, or mode of payment, and, before "the repairs were completed the shipwright demanded "payment for what he had done, it was held that the con- "tract was not an entire contract to do the whole of the "repairs and make no demand for payment until they were "completed, but that the shipwright might, from time to "time in the course of the work, demand payment for "what he had done before proceeding to complete the "residue."

It might well have been argued that the terms of the order, the appointment of Mr. Tilley, the circumstances which attended his acceptance thereof and the directions given him, taken together, authorized the application of the rule just indicated, and would have entitled him to recover even if he had voluntarily left the employment of the city after rendering specific services, but the court did not so instruct, and "mere verbal criticisms of the charge of the "judge are not entitled to any considerable weight in a "court of errors." (1 Otto, 421.)

The facts of the case at bar taken in connection with the terms of the order of August 9th, fully justified the Circuit Court in the suggestion that the compensation of the plaintiff, which was in effect a percentage of three per cent., was to be paid him from time to time, but whether or not he was entitled to *any* compensation depended upon considerations presented in other parts of the charge. And the Circuit

Court nowhere instructed the jury that the plaintiff was entitled to a ratable recompense for what services he had rendered, irrespective of the question of how his employment came to an end.

II.

In continuation of the remarks made by counsel in relation to the first error assigned, and to which I have just referred, he asserts (Mr. Crawford's brief, p. 14) that the court "in the parts of the charge on which errors have "been assigned, * * assumes that if the defendant in "error has done something in the line of his employment or "duty, he is entitled to compensation for that."

I assume reference is here made to the second, third, fifth and sixth of the assigned errors, though they are not specified in the brief. Each of these is made up of a few lines of the charge torn from the context. It is necessary to consider them in their proper relation to the whole charge.

It was not disputed that the city refused to allow Mr. Tilly to act as its architect after September, 1877, and prevented him from doing so. Were the circumstances such as to justify this refusal? Or was it unjustifiable? Did Tilly fail to perform or was performance prevented or waived by the city?

These questions were all properly put to the jury and the parts of the charge to which exception was taken, were all justified by the facts and consistent with the applicable rules of law, as the jury might find from the evidence in favor of one theory rather than the other.

The notes to *Cutter* v. *Powell*, 2 Smith's leading cases, (6th Amer. Ed.) *41, 47, lay down the principles applicable in this class of cases, and sustain them with a multiplicity of citations.

The rules are thus stated:

1—Where there has been a special contract, the whole of which has been executed on the part of the plaintiff, and the time of payment on the other side is passed, a suit may be brought on the special contract, or a general assumpsit may be maintained; and in the last case the measure of damages will be the rate of recompense fixed by the special contract.

If, however, the special contract remains open--that is to say, remains unperformed—and there be no act of fault or omission on the part of the defendants, indebitatus assumpsit will not lie.

2. If there has been a special contract which has been altered or deviated from in particulars, by common consent, general assumpsit will lie when the work has been performed; and in such case, if the original contract has not been wholly lost sight of in the work of execution, the rates of recompense fixed by it shall be the measure of damages as to those parts in which it can be traced in the performance; and for the new or extra work, the recovery shall be upon a *quantum meruit*. (p. 48, *42.)

3. If there has been a special contract which remains unaltered, and the work has been performed, but not according to the terms of the contract, so that the plaintiff could recover nothing in a special assumpsit on the contract, the question whether he can recover, in a *quantum meruit*, the value which the work is of to the defendant, will depend substantially upon the question whether the work done, is by the defendant's consent or against it. (p. 48, *43.)

4. If there has been a special contract, and the plaintiff has performed a part of it according to its terms, and *been prevented by the act or consent of the defendant*, or by the act of the law from performing the residue, he may in gen-

eral assumpsit, recover compensation for the work actually performed, and *the defendant can not set up the special contract to defeat him.*

And herein, also, it is held in *Dermott* v. *Jones*, 2 Wallace, 1, and in *School District* v. *Dauchy*, 25 Conn., 535, that the law is well settled that if a person promises, absolutely, without exception or qualification, that a certain thing shall be done at a given time, or that a certain event shall take place (the thing to be done, or the event to take place, being neither impossible nor unlawful at the time of the promise,) he is bound by his promise, unless the performance before that time becomes unlawful. And any seeming departure from this principle is considered by the court in Connecticut as *growing out of the mode of construing the contract* or *affixing a condition raised by implication, from the nature of the subject, or from the situation of the parties*, rather than from a denial of the principle itself.

Authorities are also cited under this head by the learned editors (p. 50), to the effect that in cases of *prevention by the party*, or of tender and refusal, the plaintiff has a right of action on the special contract; prevention or refusal being equivalent, for that purpose, to performance; and must declare specially, and set forth the readiness or tender and refusal, or prevention; and the measure of damages would be not the whole price agreed to be paid, but the actual loss sustained. which will consist of the value of the service rendered, and the damage sustained by the refusal to allow performance of the rest of the contract.

5. But if there has been an entire executory contract, and the plaintiff has performed a part of it, and then wilfully refuses, without legal excuse and *against the defendant's consent* to perform the rest, he can recover nothing either in general or special assumpsit.

The application of the proper rule to the facts, in this case, was made by the Circuit Court, but the plaintiff in error, now insists (Mr. Crawford's brief, p. 16), that Mr. Tilly "undertook to prepare plans and specifications which "should be agreed to by the board of county commis- "sioners of Cook county, and whether the failure to per- "form this covenant was due to the fault of the county "board or the county architect, or to any person *other than* "*the city*, makes no possible difference."

It is singular, that this theory that it was a condition precedent to Tilly being paid, that Tilly should make the county commissioners agree to what the city ordered him to do and approved and adopted when done, should make its appearance for the first time on argument in this court, and is not really presented by *either of the exceptions* taken upon the trial.

The court charged the jury as follows: (P. rec., p. 26.)

"It was the duty of the city and county authorities to agree upon this uniform plan, and non-professional persons, like the members of the common council and board of public works would require the aid of an architect in settling on the design to be adopted.

"It was therefore proper that the city should appoint an architect, and charge him, in connection with the board of public works, with the duty of agreeing upon a uniform design for this proposed building. Good faith to the county required that this should be done, so as not to delay the work of the county, even if the city was not ready to proceed.

"It therefore became the duty of the plaintiff, under his appointment, to ascertain, first, the accommodations which should be provided in the city's half of the proposed building, for the different departments of the city government.

"This did not require the preparation of full drawings or plans involving all the materials to be used, or details of construction; a mere design or sketch, allotting the space and showing how the proposed plans could be utilized to the best advantage, was all that was needed for this purpose. So much for the interior work.

"As to the exterior, inasmuch as the contracts between the county and city, required that the county and city portions should be of uniform design, one would suppose that the first step would be for the

architects of the two portions to meet, and try and agree upon a uniform plan to present to their respective clients, or if this was not done that each architect should proceed to sketch one or more designs to be discussed, and compared by the county and city authorities for the purpose of agreeing finally.

"I do not conceive from anything in the order defining his duties, the plaintiff was required or authorized to do more than suggest plans, either to the city authorities, or to the architect of the county, so as to bring the contracting parties to an agreement."

To this part of the charge or any other part of it in which the court gives its views as to the obligations of Tilly in relation to uniformity of design, *no exception was taken.*

But as we have already pointed out, the alleged condition precedent has no existence. To import such a condition into the agreement between Mr. Tilly and the city, the court would be obliged to hold that there was a stipulation on his part that he would secure the county's consent to what the city desired, and that it was the intention of the parties that performance of such a stipulation should be a prerequisite to any compensation for what Tilly might do under the city's direction. All of which as applied to the circumstances of this case is preposterous.

And if there were such a condition, it was waived by the adoption of Mr. Tilly's plan.

The uniformity of design related to the *manner* of doing the work, which could of course, be varied or waived by the employer.

The preparation of plans and specifications and superintendence were the consideration for the specified compensation, and it was enough that what was done, as far as Mr. Tilly went, was with the approval of his employer.

The question is put by Mr. Crawford (brief p. 16), "can "there be any doubt that if the defendant in error had "gone on and erected a building according to his plans,

" but that it would have been an entirely different building " from what was intended by the city authorities."

To which we reply that it would have been exactly the building intended by the city authorities because it would have been *just such a building* as the city ordered to be erected. And in fact Tilly had no power to go on and erect a building except as directed by the city council.

Again, it is said, that it was stipulated that the board of public works must "agree to the plans and specifications," and that this they never did.

But the board of public works was entirely subject to the control of the city council, and whatever they directed the board was compelled to agree to. Hence their agreement irrespective of the council was immaterial. The general incorporation law (Rev. Stat., chap. 24) under which the city was incorporated, May 3, 1875, provided for no board of public works, and the members of the old board were simply kept along in the employ of the city for a few months after the adoption of the general law, at sufferance, and clothed with no powers whatever.

But the proof establishes over and over again that what Mr. Tilly did was by direction of the board of public works (P. Rec. p. 12, p. 11, &c.) And these directions they gave long after their letter to the council of Dec. 13th (P. Rec. p. 12.)

The cases cited by counsel, *Veazie* v. *Bangor*, 53 Maine, 50, *Gibson* v. *Cranage*, 39 Mich., 49, and *Zaleski* v. *Clark*, 44 Conn., 218, are simply not in point.

III.

Mr. Crawford complains, under the second head of his brief (p. 17), that the court erred in charging the jury that Mr. Tilly "was employed, like any other employe of the

" city, to do a certain thing. It was, as far as possible, to " contribute his professional skill in the suggestion of plans, " which might or might not be adopted."

There is no magic in words. Mr. Tilly was in the employment of the city, and so was an employe. Anybody with whom a contract is made may also be called a contractor. But whether called an employe or a contractor, his rights remain the same, and are to be measured by the agreement and understanding between the parties.

Mr. Tilly did not contract with the city that he would compel the county to agree with the city or the city with the county. If he prepared plans satisfactory to the city, as he did, and if he stood ready to make such changes as the city might consent to in order to harmonize with the county, which the jury have found was the case, then he fully complied with all that was to be performed on his part.

When Mr. Tilly accepted his appointment as architect, he offered to enter into a written contract and give bonds, but the city officials advised him it was unnecessary, and directed him to proceed.

The order of August 9th, the appointment of Mr. Tilly, and the directions given him should all be taken into consideration.

The law does not deny to the court and jury the same light and information which the parties enjoyed. They are entitled to place themselves in the same situation as the parties, to view the circumstances as they viewed them, and to judge of the meaning of the words in the original order, and of their correct application, and of what the actual agreement really was.

IV.

"CAN THE DEFENDANT IN ERROR RECOVER UPON A QUANTUM MERUIT?"

Under this inquiry, Mr. Crawford says, all "the concluding errors" are to be considered, and he cites *Veazie* v. *Bangor*, 53 Maine 50, which holds that a plaintiff can not recover either under a count on a special contract *or* on *quantum meruit*, if he "wilfully or purposely neglects "or fails to perform a contract made by him."

It is held, however, as it had been previously in *Veazie* v. *Bangor*, 51 Maine, 512, that when there has been no *intentional* departure from the contract or failure to perform it, but the party has acted in good faith, endeavoring to fulfill it according to its terms, in case of failure, he may recover what his services are worth, less the damage occasioned by such failure.

We understand the law to be as stated in the 4th proposition laid down in the notes of the American editors to *Cutter* v. *Powell*, cited *supra*, that if there has been a special contract and the plaintiff has performed part of it according to its terms, and been prevented by the act or consent of the defendant from performing the residue, he may in *general assumpsit* recover compensation for the work actually performed, *or* he may in case of prevention or of tender and refusal declare specially and set forth the readiness or tender and refusal, or prevention.

In the case at bar the plaintiff declared specially and also filed the common counts, and under the latter might well have claimed a recovery for the value of the work he actually did, which was far greater than the proportionate amount of the price to be paid for the entire services, if the city had allowed him to render them, but the court limited the recovery to the ratio of the entire compensation,

of which ruling the plaintiff below might well complain, but the defendant below could not.

Conceding that the court stated the positions of the city to the jury, it is nevertheless contended by Mr. Crawford, that "the whole theory of the charge was that the plaintiff was entitled to recover something, and that all the jury had to do, was to ascertain how much this was," and he says the exceptions taken show this. We assume that counsel alludes to the third, fifth and sixth errors assigned, but when the charge of the court is examined as a whole, it will be found that these parts of it were intended to moderate the verdict, in case the jury should arrive at the conclusion that the plaintiff was entitled to recover at all upon the principles laid down.

But the court would have been justified in instructing the jury very much more favorably for the plaintiff, for it is indisputable upon the testimony in this record that the plaintiff did a vast amount of work for the city under its directions; that he was prevented by it in the first instance from going on, because the treasury was empty, and not on account of any dissatisfaction with him, and that he was finally discharged because the city chose to dispense with his services, and without fault on his part.

The only pretense of a conflict of evidence, would be upon the point of the efforts Mr. Tilley made to come to an agreement with Mr. Egan prior to the meeting of December 11th, and this was all properly and specifically put to the jury by the court. Nor was it really material how this was, in view of the fact that the city council, January 13th, 1876, approved of the compromise plan of Mr. Tilley and did not approve of that of Mr. Egan.

So that there actually was no question for the jury, except the amount to which plaintiff was entitled.

But the charge did not say this, but carefully left to the

jury every question of fact which the defendant contended constituted a defense.

VI.

Of the six errors assigned, counsel has discussed but two specifically, and has referred to the other four only generally, as embodying views in contravention of his theory that the case is one of inexcusable failure to perform a condition precedent, and this I have sufficiently considered.

The extracts must necessarily be taken in connection with the context from which they are torn, and are fully sustained by the evidence as set forth in the record.

The charge contains in itself a substantially accurate and full statement of the testimony, an examination of which will demonstrate that the judgment ought to be affirmed.

Respectfully submitted.

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